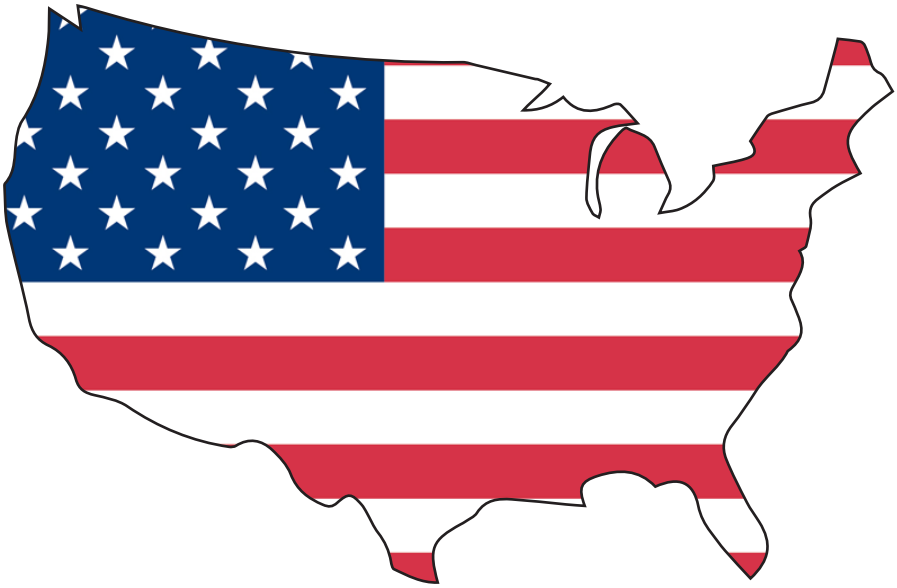

PICKING *the* PRESIDENT

Understanding the Electoral College

Revised and Expanded Edition

edited by Eric Burin

Picking the President

Understanding the Electoral College

Revised and Expanded Edition

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Understanding the Electoral College

Revised and Expanded Edition

Edited by
Eric Burin

The Digital Press at the
University of North Dakota
Grand Forks, ND

For Lester Brooks

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Preface to the Revised and Expanded Edition

The impetus for the first edition of *Picking the President: Understanding the Electoral College* was the 2016 presidential election, which ended with Democrat Hillary Clinton, who had received the most popular votes nationwide, losing the contest to Republican Donald Trump, who had secured a majority of electoral votes. The subsequent discourse on the United States' presidential election system—commonly called the "Electoral College"—was unprecedentedly widespread. It also was increasingly partisan. And it was not infrequently ill-informed. In response, the first edition of *Picking the Presiden*t was published in February 2017, going, as noted in its preface, from "conception to completion" in five weeks. As the volume's subtitle suggests, the book's goal was to promote understanding of the Electoral College.

If the 2016 presidential election sparked an unprecedented public discourse on the Electoral College, the 2020 contest featured unprecedented efforts to exploit the system. At their epicenter stood Trump and their objective was to overturn his defeat to Democrat Joseph Biden. They culminated in the deadly attack on the U.S. Capitol on January 6, 2021, the first violent interference with the peaceful transfer of presidential power in U.S. history.

Meanwhile, *Picking the President* proved the little book that could. Now, approximately eight years after its release, the first edition of *Picking the President* stands as a small monument to those who made it possible and to popular interest in the United States' presidential election system. The Revised and Expanded Edition likewise rests on the former and welcomes the latter.

This new edition of *Picking the President* has the same goal as the first: to promote understanding of the Electoral College. To this end, Part I ("The First Edition of *Picking the President*") consists of the first edition's Preface, Introduction, and fourteen essays (but not its Documents section). Part II ("New Perspectives on the Electoral College") unveils a new Prelude, a new Introduction, and fifteen new essays. Part III ("Resources") features fifty items,

including the complete debate on the subject at the Constitutional Convention, which illuminate the creation, ratification, and early evolution of the United States' presidential election system.

Like the first edition, the Revised and Expanded Edition was assembled expeditiously. Once again, it is gratefully acknowledged that "this swiftness was made possible by working with The Digital Press at the University of North Dakota" and that "the volume came to fruition speedily because the contributors agreed to pen brief essays in short order." In addition, for their timely assistance with the Revised and Expanded Edition, the Center for the Study of the American Constitution and the Wisconsin Historical Society are appreciatively recognized.

Part I

The First Edition of *Picking the President*

Preface

The 2016 presidential election has sparked an unprecedented interest in the Electoral College. In response to Donald Trump winning the presidency despite losing the popular vote, numerous commentators have weighed in with letters-to-the-editor, op-eds, blog posts, and the like, and thanks to the revolution in digital communications, these items have reached an exceptionally wide audience. In short, never before have so many people had so much to say about the Electoral College.

This remains a high-stakes debate, and historians, political scientists, philosophers, and other scholars have an important role to play in it. They can enrich discussions about the Electoral College by situating the system within the history of America and other societies; untangling the intricacies of republicanism, federalism, and democracy; articulating different concepts of political morality; and discerning, through statistical analysis, whom the Electoral College benefits most. In spotlighting the Electoral College from various vantage points, this volume aims to empower citizens to make clear-eyed decisions about it.

If one of this volume's goals is to illuminate the Electoral College, another is to do so while many people are still focused on the topic. This project came together quickly. The entire enterprise went from conception to completion in a mere five weeks. That swiftness was made possible by working with The Digital Press at the University of North Dakota, which embraces a cooperative, transparent model of publication with the goal of producing open-access, electronic works that can attract local and global audiences. Likewise, this volume came to fruition speedily because the contributors agreed to pen brief essays in short order. As a result, while their works have the hallmarks of scholarly articles, they do not constitute an exhaustive examination of the Electoral College. Indeed, many germane subjects are not addressed. Even so,

these learned ruminations can enhance the ongoing debate about the Electoral College.

Essays of this sort are much-needed, for the post-election dialogue about the Electoral College has been warped by partisanship. Republicans who reckon that Electoral College benefits their party usually have defended the system. Conversely, Democrats, smarting from the fact that in a span of sixteen years they have twice lost the presidency despite popular vote triumphs, typically have denounced it. This mode of assessment is unfortunate, for it impairs our ability to analyze the Electoral College on its own merits, as opposed to how it affects one party or another. Put another way, the Electoral College is an inherently political institution, but appraisals of it need not be invariably partisan.

To facilitate and expand the conversation about the Electoral College, this volume offers short essays that examine it from different disciplinary perspectives, including philosophy, mathematics, political science, communications, history, and pedagogy. Along the way, the essays address a variety of questions about the Electoral College: Why was it created? What were its antecedents? How has it changed over time? Who benefits from it? Is it just? Should we alter or abolish the Electoral College, and if so, what should replace it? In exploring these matters, *Picking the President* provides timely insights on one of America's most high-profile, momentous issues.

Introduction

A Brief History of the Electoral College

Eric Burin

In 1787, Americans probably had more experience writing constitutions than any people ever. They had adopted the Articles of Confederation during the Revolutionary War, and had penned thirteen state constitutions, as well. Perhaps for this reason, it is doubtful anyone arrived at the Constitutional Convention thinking that the Electoral College was the way to pick a president.

Instead, the convention's delegates identified three groups that could select the president: Congress, state governments, or the people. Some delegates (including, at one point, James Madison) favored a popular vote, but many representing slave states or states with restrictive franchise laws objected. Consequently, a good number of attendees championed the congressional option (understandably so, since in most states the legislature elected the governor). This plan nearly triumphed, but a last-minute attempt by South Carolina delegate John Rutledge to privilege the more populous states by having the president be picked by a joint ballot of the Senate *and* House, when combined with a lingering desire to make the executive branch more independent of its legislative counterpart, derailed the proposal. Ultimately, the convention adopted the Electoral College and embedded it in Article II of the Constitution.

Article II is among the most detailed parts of the Constitution and it can be found in its entirety in this volume's Documents section, but it is worthwhile to highlight a few key features here: Under this system, electoral votes were allotted to each state based on the number of representatives it had in the House, plus its two senators; state legislatures determined how the electors were picked; each elector could cast two votes for president; and if a

presidential candidate failed to get a majority of electoral votes, the House of Representatives, with each state getting one vote, would select the president and vice president from among the top-five electoral vote-getters. Several essays in this volume examine why many founders thought this process for picking the president was (to paraphrase Alexander Hamilton) if not a perfect system then at least an excellent one.

After the Constitution was ratified, the Electoral College underwent modifications. These changes were spurred by something the delegates at the Constitutional Convention hadn't anticipated—the rise in the early 1790s of two competing political parties, the Federalists and the Democratic-Republicans. The convention delegates originally envisioned the Electoral College being comprised of knowledgeable and honorable men who, more often than not, would forward to the House a list of commendable, broad-minded presidential candidates, each of whom enjoyed some regional but not national renown. But the infusion of party politics caused the Electoral College to misfire: In 1796, a Democratic-Republican, Thomas Jefferson, ended up serving as vice president to a Federalist president, John Adams. In 1800, Jefferson and his running mate Aaron Burr received the same number of electoral votes, causing a constitutional crisis that nearly led to bloodshed. In response, in 1804, the 12th Amendment was adopted, the most important feature of which was requiring electors to cast separate ballots for the president and vice president. Thereafter, presidential contests became more democratic affairs, essentially morphing into popular referendums on party platforms and the candidates who championed them.

The advent of partisanship also affected the way states selected presidential electors. Early on, most states invested state legislators with that power. But party leaders soon perceived the advantages of adopting statewide, winner-take-all systems (as a case in point, Jefferson's 1796 defeat could be attributed to three solitary Federalist electors who hailed from states that were otherwise in the Democratic-Republican camp). By 1820, the number of states using the statewide system equaled those still using the legislative system. Meanwhile, only a handful of states picked electors by dis-

tricts. This was the method, Madison wrote in 1823, that the convention delegates had had in mind when they adopted the Electoral College, and consequently he called for an amendment that would have required states to use the district system. Madison's proposal fell on deaf ears, and by 1836, every state except South Carolina had adopted the statewide system. Even so, the sentiment in favor of the district method never expired. In 1966, for example, Delaware, along with eleven other states (including North Dakota), filed suit against New York, arguing that the latter's winner-take-all system effectively disfranchised the less populous states. The U.S. Supreme Court refused to hear the case, and like that ill-fated suit, recent proposals to institute the district method, or hybrid systems like those used in Maine and Nebraska, have made little headway against entrenched political interests.

The collapse of slavery during the Civil War brought to the fore another long-standing political dispute that affected the Electoral College: Which residents should be counted when allocating House seats? Previously, slaveholding states could count three-fifths of their enslaved residents toward their representation in the House. With slavery's demise, newly emancipated African Americans, who at this juncture were not permitted to vote, could now be counted as five-fifths of a person, meaning white southerners' political power was poised to increase during the postbellum period. The emergence in 1867 of Radical Reconstruction, with its commitment to establishing an interracial democracy in the postwar South, resolved this issue, at least temporarily. The enactment of the 14th Amendment in 1868 (which diminished a state's share of House seats proportionally to the extent to which it barred adult male citizens from voting) and the 15th Amendment in 1870 (which prohibited disfranchisement on account of race, color, or previous condition of servitude) effectively granted southern states full representation in the House and the Electoral College on the condition that black men be allowed to vote. By 1900, however, white "redeemers" had seized control of southern governments and disfranchised nearly all black residents with literacy tests, grandfather clauses, and other ostensibly race-neutral mechanisms. As a result, southern states could count African Americans when laying claim

to House seats and electoral votes, even though such persons enjoyed virtually no political rights. Many of the redeemers' methods were subsequently outlawed, but disputants still debate how non-voters (such as legal and illegal immigrants, minors, prisoners, and ex-felons) should be counted when distributing House seats and—concomitantly—electoral votes.

The size of the House of Representatives also affects the Electoral College. The Constitution provides little guidance on the matter, only stipulating that 1) apportionment be based on state populations, 2) every state gets at least one Congressperson; and 3) each Congressperson represents no less than 30,000 residents. After the 1790 census, Congress passed a bill that called for 120 House seats, but President George Washington issued a veto—the first veto in U.S. history—with the result being that a subsequent law established the number of seats at 105. Thereafter, Congress almost always increased the number of House seats to keep pace with population growth and the addition of new states into the Union (though there were debates as to how exactly those seats should be divvied up). In 1911, in customary fashion, Congress enacted another apportionment law, this time creating a 433-member House (with a provision that one seat each would be added for Arizona and New Mexico when they became states). Over the next ten years, immigration, migration, and urbanization so altered the nation's demographic landscape that Congresspersons who feared that the next reapportionment would diminish their states' political clout managed to prevent such a law from being passed after the 1920 census. When Congress finally enacted a reapportionment law in 1929, the new statute permanently fixed the number of House seats at 435. Then and now, this cap hurts the most populous states in the House, and by extension, in the Electoral College.

The post-World War II struggle for greater inclusiveness in America brought renewed attention to the Electoral College. The most instrumental change concerned the 23rd Amendment, a measure that allotted electoral votes to the District of Columbia, which was home to 763,000 people. The bill passed Congress in 1960 with considerable bipartisan support, perhaps a reflection of

the era's democratic sensibilities, as well as the fact that it wasn't clear whether Republicans or Democrats would win those additional electoral votes. Thereafter, the measure quickly secured the approval of three-quarters of the states. The District's participation in the Electoral College serves as a reminder that many other U.S. possessions are not treated similarly: In the 2016 election, four million Americans (about as many people living in Wyoming, Vermont, Alaska, and North Dakota combined), almost all of them citizens, resided in parts of the U.S., such as Puerto Rico, Guam, and the U.S. Virgin Islands, that were excluded from the Electoral College.

That exclusivity, when combined with the Electoral College's inherently undemocratic nature, has produced results that, in the estimation of some of the system's modern critics, are nearly random, especially when presidential contests feature evenly matched major party candidates and/or strong third-party candidates. For example, in the 1968 race, a good showing by American Independent Party candidate George Wallace and slim margins of victory in key states by Richard Nixon, left many—including Nixon himself—dissatisfied with the Electoral College. In response, Congress took up the Bayh-Celler Amendment, the most serious challenge to the Electoral College to date. This popular vote proposal passed the House but died in the Senate at the hands some small states and many southern ones, where disfranchised African Americans could still be counted when allocating electoral votes. Thereafter, Jimmy Carter's rather contingent and fortuitous victory in 1976 and Ross Perot's notable runs as the Reform Party candidate in 1992 and 1996 inspired additional calls for reform, as did George W. Bush's victory in 2000, in which he won the electoral vote despite losing the popular vote. Similarly, in 2016, Hillary Clinton secured over 2.8 million more votes than Donald Trump, but the latter triumphed in the Electoral College, thanks to narrow victories in a handful of swing states. Such quirks have always been a part of the Electoral College. But in light of the 24th Amendment (which banned the poll tax), the 1965 Voting Rights Act (which established federal protections to safeguard access to the ballot box), the Supreme Court's affirmation of the "one person, one vote"

principle, and other advances in political egalitarianism, these anti-majoritarian and seemingly unpredictable outcomes are, from the perspective of those who decry the system, disturbingly out of sync with modern sensibilities. As proof, they note that in no other contest do Americans employ anything like the Electoral College.

Even so, those who would alter or abolish the Electoral College have a difficult road ahead. Although the system always has been subject to dispute, and opinion polls dating back to the 1940s have shown most Americans preferring a popular vote for president, revising or discarding the Electoral College has proved exceedingly difficult. Moreover, in the immediate aftermath of the 2016 election, the Electoral College became a decidedly partisan issue: Republican support for a constitutional amendment in favor of a popular vote plummeted to 19%, down from 54% in 2011. Furthermore, the 2016 election resulted in Republicans controlling not just the presidency, but also both houses of Congress, 33 governorships, and 68 of 99 state legislative chambers. Given these attitudinal and political conditions, it seems almost certain that the Electoral College will remain embedded in the Constitution for the foreseeable future.

Still, reformers have some cause for optimism. For starters, they can point to the incremental progress of the National Popular Vote Interstate Compact (NPVIC), an arrangement wherein participating states pledge to cast their electoral votes to the winner of the national poplar vote, regardless of the outcome in their particular state. This proposal, which has the advantage of embracing rather than resisting each state's right to determine the means by which it selects presidential electors, would go into effect once the participating states account for a majority of the 538 electoral votes available. As of 2016, ten states, plus the District of Columbia, had signed on. Collectively, they account for 165 electoral votes—61.1% of the 270 needed for the compact to become operational. Those joining the NPVIC thus far have tended to lean strongly Democratic, and there are good reasons to believe that the compact's supporters will encounter more resistance in swing states (which may be unwilling to forego the outsized influence they wield in the Electoral College) and Republican-controlled

states (which *currently* oppose alterations to the system). Nevertheless, history shows that attempts at dealing with the Electoral College's alleged defects have made the most headway when it produces especially controversial results, and during periods of partisan tumult and realignment. Such appears to be the case today. These circumstances, when combined with the American ethos of advancement, provide reformers with a glimmer of hope, for as Madison remarked about the means by which Americans pick their president, "a solid improvement of it is a desideratum that ought to be welcomed by all enlightened patriots."

This volume reflects the notion that professional humanists and social scientists have something substantive to offer "enlightened patriots." It is not intended to be a comprehensive survey of the Electoral College, nor does it seek to dictate the terms of debate about the system. Rather, it aims to add perspectives, arguments, and historical evidence. In short, it provides timely, learned responses to one of the most consequential issues of the day, and as such, it endeavors to foster thoughtful, civil discourse among an engaged and informed public.

The essays in Section One put the Electoral College in comparative perspective. **William Caraher** examines how the political institutions of ancient Athens and Rome foreshadowed the Electoral College. **Donald F. Johnson** explores the ways in which the Electoral College mimicked the noble-dominated federal monarchies of early modern Europe. **Manisha Sinha** compares the Electoral College to the "rotten borough" system that existed in Britain until the mid-19th century. **Andrew Meyer** likens the Electoral College to the mechanisms that China adopted to bind together that vast and diverse society. These contributions allow us to see the Electoral College in a new light by placing it side-by-side with comparable political institutions.

The essays in Section Two investigate how the Electoral College has shaped American politics historically. **Andrew Shankman** discusses the ideological assumptions that undergirded the creation of the Electoral College, and the political realities that prompted the ratification of the 12th Amendment. **Patrick Rael**

surveys how the Electoral College affected southern political power before and after the Civil War. **Cynthia Culver Prescott** situates the Electoral College's persistence within the larger story of America's halting progress toward equality. **Timothy Prescott** uses statistical analysis to assess the historical relationship between the popular vote and the electoral vote. These works permit us to view contemporary disputes over the Electoral College against the backdrop of the system's long history.

Section Three features five essays that debate the merits of the Electoral College from different disciplinary viewpoints. Philosopher **Jack Russell Weinstein** contemplates whether it is just to have the electoral vote diverge from the popular vote. Communications professor **Mark Trahant** points to the rise of the digital economy and egalitarian values when calling for reforms to the Electoral College and other undemocratic political institutions. Political scientist **Mark Stephen Jendrysik** argues that the Electoral College is an outdated system, and when it produces anti-majoritarian outcomes, it invites a crisis of political legitimacy. Another political scientist, **Benjamin J. Kassow**, warns that any alteration to the Electoral College will necessarily entail important political tradeoffs. Historian **Allen Guelzo** and lawyer **James H. Hulme** emphasize federalism's virtues in defending the Electoral College. Like the proverbial blind men describing different parts of an elephant, each of these essays provide a distinct perspective on the Electoral College.

In Section Four, **Brad Austin** reflects on how teaching about the historical development of the Electoral College provides an opportunity to cultivate empathy in the classroom. In some ways, his contribution points toward the Documents section at the end of the book. The documents, which are well-known and in the public domain, invite readers to think for themselves about origins and evolution of the Electoral College in the early American republic.

Section One
The Electoral College in Comparative Perspective

I.1.

Ancient States and Representative Government: Greek and Roman Models for the Electoral College

William Caraher

The framers of the U.S. Constitution looked to antiquity as an inspiration for their own republic. The city-state of Athens during its Classical efflorescence represented a model for democracy, but it was not nearly as compelling as the Roman Republic alternately celebrated by Enlightenment authors and English reformers. Both ancient civilizations offered historical precedents for representative forms of government that allowed the architects of the various colonial and state constitutions, the Articles of Confederation, and the U.S. Constitution to appeal to traditions of government outside and older than the rule of the European aristocracy. Neither the Athenian democracy in its various forms nor the Roman Republic offered an exact precedent for the Electoral College, but both recognized the importance of recognizing regional interests in the context of their popular institutions.

Democratic Athens of the 5th century BC, featured a popular assembly made up of all citizens which generally meant male property owners of military age. This assembly met in Athens to vote on whatever legislation that the state required. Over the course of the 7th and 6th centuries BC various institutions served the roles of the executive, generally an office called the archon, and for a range of different judiciary functions. Most importantly for our purpose here, there existed a council responsible for preparing the legislation upon which the popular assembly would vote. In the late 6th century, the Athenian politician Cleisthenes negotiated a series of reforms in Athens including the creation of a "Council of 500"

which would serve this function. This council included 50 representatives from each of ten tribes. Each tribe represented communities from each of three non-contiguous regions in Attica, the territory ruled by the city of Athens: the city, the coast, and the interior. The goal of this arrangement was to ensure that each region had representation in the Council of 500 and played a role in the preparation of legislation for the popular assembly (whether this is how this arrangement functioned in practice remains difficult to know). The organization of the Council of 500 around territorially diverse tribes provided an important representative counterweight to the popular assembly which tended to be biased toward citizens resident in Athens or who could afford time away from their field, businesses, or jobs to attend voting sessions. In this effort to balance regional concerns with the direct democracy of the assembly, Athens provides an early example of a representative council in the Western tradition. While the tribal basis for the Council of 500 did not ensure each region distinct representation within the Athenian government, it appears to have acknowledged the diverse regional interests present in the Athenian state and it recognized, at least in theory, that compensating for regional interests served as a kind of counterweight to the popular assembly.

Whatever the innovation present in democratic Athens, the Roman Republic provided a far more compelling and influential model for the framers of the U.S. Constitution. Rome, like Athens, did not have a written constitution to guide its governmental structure, but we know enough about how it functioned from historians in antiquity. The Roman Republic possessed an array of assemblies and councils each with specific functions and advantages to particular groups. Unlike Athens, there was far less emphasis on the democratic, popular assembly and a fundamental commitment to the republican practice of voting blocks which represented groups of citizens within Roman society. The two most significant of these councils were the *comitia centuriata* and the *comitia tributa*. In the comitia centuriata, Roman citizens were grouped into first 193 and then 373 centuries according to wealth. Each century was a voting block and the majority of voters within the century decided the vote of that century. The wealthiest citizens were divid-

ed into more centuries than the poorest giving them more voting blocks. Moreover, the wealthiest centuries voted first resulting in most elections being decided long before the poorest blocks voted, although reformers consistently tried to shift the balance toward the poorest voters.

The poorest voters tended to congregate in the city of Rome, and this marginalized their political influence in other major assembly, the comitia tributa, which was organized according to region of residence. The city of Rome consisted of four urban tribes whereas the surrounding regions, eventually expanded to include all of Italy, comprised an additional 31. Each of the 35 tribes had a single vote with the 31 rural tribes tending to represent the interests of wealthier, rural landowners. Like in the comitia centuriata, the majority of tribes carried decisions in this assembly. In fact, the politically marginal character of the urban tribes was such that a punishment for certain kind of crimes included moving the guilty individual's tribal affiliation from a rural to an urban tribe to affect a kind of political disenfranchisement. Like in Athens, regional concerns played a role in managing the political balance of the Roman Republic.

While neither the representative council in Cleisthenic Athens or the comitia tributa in republican Rome represented a precise analog to the Electoral College, the Electoral College and the Roman assemblies shared the concept of voting blocks that is, in some appraisals, central to the idea of republican governance. For Rome, the comitia tributa also allowed for the state to expand voting and citizen rights into newly conquered territories while maintaining the privileges of the traditional aristocracy through their control of the majority of tribes. While this may appear to be a regressive tactic designed to conserve the political power of the traditional Roman elite, it also allowed the Roman state to expand political rights to new populations in ways that would have been more politically risky for a direct democracy like in Athens. By slotting new citizens into existing tribes or sequestering them into a small number of tribes, the Roman elite also ensured the stability of the state even during times of expansion.

Today, political commentators like to look to Rome and Athens to predict or make sense of the American political trajectory. This makes sense, of course, because the challenges faced by the Roman Republic and the democracy of Athens allow for sensationally tragic presentations of our country's political fate set amid the fundamental conservatism of the republican political tradition. Whether the U.S. will fail because of this adherence to these outmoded republican practices or find within them stability during times of dynamic change is beyond the limited gaze of the historian's craft.

I.2.

The Electoral College as American Aristocracy

Donald F. Johnson

Although dedicated to creating a republic, for the framers of the United States Constitution a stable aristocracy was essential to the project of crafting a Federal state. Basing their ideas on enlightenment theory and the British constitutional tradition, Constitutional architects such as James Madison and Alexander Hamilton envisioned a strong, independent class of well-educated, wealthy, independent men, who could mimic the function of European nobility and act as a check on potentially tyrannical executives or overly populist legislative assemblies. The Senate, meant to be a republican version of the British House of Lords, was perhaps the most obvious attempt at enshrining the interests of these wealthy men in government at the national level. The Electoral College, however, was crucial in creating a functioning local aristocracy in America. And, unlike the Senate, it is one that has never been democratized, maintaining to this day its connections to the monarchial governments of early modern Europe upon which it was based.[1]

Indeed, if the Senate was meant to establish a national aristocracy, the framers intended for the Electoral College to maintain elite representation at the state and local levels. The Constitution prescribed no form of selection for state electors, and did not bind

[1] On the importance of mixed government for the framers, see James Madison, *Federalist* No. 40 and Alexander Hamilton, *Federalist* Nos. 23-28. For their Enlightenment inspiration, see Locke, *Two Treatises on Government* (1689) and Montesquieu, *On the Spirit of the Laws* (1748). On the Senate as safely fulfilling the aristocratic function in a mixed republican government, see Madison, Alexander Hamilton, and John Jay, *Federalist* Nos. 62-66.

them to follow popular elections for president in any way. As the Alexander Hamilton's *Federalist* No. 68 demonstrates, the College was meant to be a check on the excesses of the people, comprised of wealthy men "free from any sinister bias" who would protect the presidency from falling into the hands of "any man who is not in an eminent degree endowed with the requisite qualifications." Hamilton, Madison, and other Federalists assumed that state-level elites would act as a further check on the powers of the people and of demagogues who might seduce them. Still, such a blatantly un-representative feature seems out-of-place in a representative form of government.[2]

This dissonance is because the Electoral College was based not on republican theory but on the structure of aristocratic elective monarchies in eighteenth-century Europe, most notably the Dutch Republic, the Commonwealth of Poland-Lithuania, and the Holy Roman Empire. In the Netherlands, representatives from seven feudal provinces, each administered independently by hereditary lords, gathered periodically to elect a stadholder, or steward, responsible for leading the Dutch army in wartime, administering foreign affairs, and resolving conflicts between the provinces. Typically, stadholders came from the House of Orange, which became the de facto royal family of the Netherlands (and whose most prominent member, William III, ascended the throne of Great Britain in 1688). Nevertheless, through the electoral system nobles of each province maintained autonomy over their provinces.

In early modern Poland-Lithuania, nobles came together from tens of thousands of sovereign fiefs to elect new monarchs upon the death of a prior king. Meeting in the sjem, or noble Parliament, these aristocrats tended to elect members of prominent families from among their own ranks, though elections could be bitterly disputed and more than once led to schisms and civil wars. Still, as in the Dutch Republic, the sjem ensured that nobles maintained power within their domains, and exercised supervisory authority over their executive.

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[2] For the selection of electors, see the United States Constitution, Article II, Section 1. For Hamilton's analysis, see Hamilton, *Federalist* No. 68 in the Documents section.

Finally, the Holy Roman Empire comprised perhaps the oldest and most well-known electoral college. For almost a thousand years, seven to ten electors of various German and Italian states comprising the Empire met periodically to elect a new Emperor, who usually came from the Hapsburg dynasty of Austria. Despite its seeming stability, however, electoral politics in the Empire were fraught with religious and political intrigue, and prince-electors (of whom George III of Great Britain, in his dual capacity as ruler of Hanover, was one) exercised near total autonomy over their own domains.[3]

The American Electoral College thus resembles more closely those of noble-dominated Federal monarchies of late-eighteenth century Europe than the British-style mixed constitution from which the framers drew much of their inspiration. Electors, drawn from the elites of each state in the Union, would confirm not only the integrity of the presidency but also maintain the power of the local aristocracies in each region of the country. Yet, while the electoral systems of the Netherlands, Poland, and the Holy Roman Empire were destroyed in Revolutionary fervor during the 1790s and 1800s, the American Electoral College persists in much the same form established in 1789.

Indeed, the Electoral College continues to perpetuate a regional American aristocracy. Unlike the Senate, which was reformed in 1913 to allow for direct elections, electors are still appointed by state legislatures and governors, and typically comprise local elites. 2016 electors for the state of New York, for example, included former President Bill Clinton, current governor Andrew Cuomo, and current New York City Mayor Bill de Blasio.[4] Given its noble origins in pre-Revolutionary Europe and recent dramatic splits between the electoral and popular votes, perhaps further consideration of its place in modern American society is in order.

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[3] For more on the composition of the Holy Roman Empire, Poland, and the Netherlands in the early modern period, see Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (Cambridge, 1997).

[4] "Duly Appointed Presidential Electors." *The Green Papers: 2016 General Election*, accessed December 27th, 2016; http://www.thegreenpapers.com/G16/EC-Electors.phtml.

I.3.

America's Rotten Electoral College System

Manisha Sinha

Something stinks about the recent presidential election. It emanates from the country's rotten Electoral College system for selecting the president of the United States. I use the term rotten advisedly. America's Electoral College in the twenty-first century resembles Britain's "rotten borough" system of electing members of Parliament in the eighteenth and nineteenth centuries. Not only was the franchise restricted to an elite but "rotten boroughs" with very few voters could elect representatives to Parliament like the far more populous industrializing urban centers. With the Great Reform Acts of 1832 and of the 1860s, Britain adopted universal manhood suffrage and did away with rotten boroughs. But the United States persists in retaining its undemocratic and clunky Electoral College.

When the framers of the Constitution devised the office of the presidency as a republican stand-in for the British monarch and indirect presidential elections through an Electoral College, they did so as a check on democracy. Each state was rewarded the same number of electoral votes as their congressional delegation, giving small states that had equal number of senators as larger states and slaveholding states that received greater representation in the House of Representatives because of the three-fifths clause, greater electoral weight in the presidential elections. The anti-democratic nature of selecting the president was amplified by most states, which initially had their legislatures rather than their voters select presidential electors. With the spread of Jacksonian democracy, adult white men got the right to vote for presidential electors except for one holdout, South Carolina until the Civil War.

Constitutional purists who want to retain the Electoral College must recall that American democracy has progressed through constitutional amendments. The blueprint for presidential elections has proven to be one of the Constitution's most inefficient sections. One of the earliest constitutional amendments, the 12th, clarified that electoral votes for the presidency and vice presidency must be distinct. The demise of slavery mandated by the 13th Amendment, and with it the three-fifths clause that gave slaveholders such a powerful say in government, made political representation in the United States more equitable. The expansion of suffrage for African Americans and women through constitutional amendments, the 14th, 15th, and 19th Amendments, and the Voting Rights Act of 1965 were important milestones in the growth of American democracy.

The cumbersome Electoral College, however, has remained in place, partly because its undemocratic nature has not been so egregiously showcased as in the recent presidential elections. Before 2016, only four times in American history has the winner of the popular presidential vote not won the Electoral College. The most recent instance until this year was the contested Gore-Bush presidential election of 2000. But this year, the candidate who lost the Electoral College, Hillary Clinton, won the popular vote overwhelmingly, by nearly three million votes, the largest margin ever for the loser of the Electoral College. These results discredit the Electoral College system that weights voters in certain areas more than others and makes many of the states in the heartland and the South the "rotten boroughs" of today. It calls into question the democratic legitimacy of the presidential elections. Over two hundred years ago, American patriots rejected "virtual representation" in the British Parliament for self-government. That tenuous experiment in republican government has survived only by expanding the boundaries of democracy. It is high time then that we got rid of the rotten borough Electoral College system of electing presidents of the United States.

I.4.

The South (or the North, or the West...) Will Rise Again, and Again, and Again: Viewing the Electoral College from the Perspective of Chinese History*

Andrew Meyer

On July 20, 1842, during the Opium War, British soldiers and warships captured the garrison town of Zhenjiang, at the juncture of the Yangzi River and the Grand Canal in the Qing Empire's Jiangsu Province. When news reached the Daoguang Emperor (r. 1821-1850) in Beijing, he authorized his emissaries to treat for peace. Though Qing resistance up to that point had been robust, the capture of Zhenjiang gave the British control of a fatal fracture point in the larger imperial edifice.

With the Grand Canal blocked, little tax revenue could flow from the southern reaches of the empire to the capital. Two-thirds of the population of the Qing empire lived south of the Yangzi, and the economic disparity south-to-north was even greater than the demographic one. The per capita GDP of the agriculturally and commercially rich southern Jiangnan region was nearly twice that of more arid, sparsely populated northern districts like Qinghai and Gansu. The revenue system of the Qing, which drew tax receipts into the capital on the North China Plain, served as a wealth-transfer mechanism from the wealthy south to the impoverished north. Disrupting that flow for any length of time could cause the precarious social contract holding the empire together to unravel.

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* A version of this essay appeared as Andrew Meyer, "The South (or the North, or the West...) Will Rise Again, and Again, and Again: Viewing the Electoral College from the Perspective of Chinese History," *Madman of Chu* (blog), November 22, 2016, http://madmanofchu.blogspot.com/2016/11/the-south-or-north-or-west-will-rise.html.

In the wake of the Opium War, the worst fears of the Qing government were realized. In Guangzhou (Canton) in 1837, the young scion of a southern gentry family, Hong Xiuquan (1814-1864) had for the second time sat for and failed the imperial exams that were the surest route to political, economic, and social success. The pass rates on the exams were extraordinarily low throughout the empire, but the odds were made even worse for southerners like Hong by the imposition of quotas favoring candidates from disadvantaged northern regions. His rage and frustration at this second failure induced a nervous collapse: he fell into a feverish state in which he had prophetic visions. After the Opium War, he came to understand these visions as a divine calling and began to gather followers. The movement that he began eventually threw the Qing Empire into civil war, with large parts of southern China breaking away to form the Taiping Heavenly Kingdom from 1850 to 1864. Unity was only restored after conflict that left as many as 20 million people dead and the economy of the empire shattered.

The Taiping Rebellion is only one (though admittedly among the worst) of the many instances of cataclysmic breakdown experienced within the Chinese empire over the 2+ millennia of its history that were, in part, induced by inter-regional tensions and conflicts. Successive imperial regimes struggled to hold together an expansive domain throughout which social and economic capital was unevenly distributed. Though Chinese leaders developed and maintained redistributive mechanisms to offset regional disparities (for example, the quotas favoring northern candidates in the imperial exams), these were not generally elastic and responsive enough to relieve the persistent centrifugal forces driving the component regions of the empire apart. The problem, moreover, remains an urgent concern today, as attested by the recent unrest over Beijing's refusal to allow two secessionist legislators to be sworn in as members of the Hong Kong Legislative Council.

This history poses lessons for those of us contemplating the issue of the Electoral College in the wake of the 2016 election. Not only has the Electoral College subverted the results of the popular vote for the second time in less than twenty years, but the 2016 race has yielded an unprecedented disparity between popular and

electoral vote outcomes. Hillary Clinton won the popular vote by 2.86 million votes (a 2.1% lead) and lost the Electoral College by 74 votes (a 23% deficit). That the relative differential between the two vote tallies should be so wide understandably creates a sense of profound unfairness—the impression that the democratic will of the people has been effaced by an arcane institution.

Though there will be renewed calls for the abolition of the Electoral College, the historical experience of China should give us pause to wonder at the wisdom of such a course. Like China, the United States is a vast and diverse domain in which social and economic capital are unevenly distributed and the interests of different groups vary widely from region to region. The 2016 election has starkly highlighted the regional tensions straining our social fabric, with voters in the industrial Midwest and rural Appalachia mobilizing to deliver an electoral result that radically undermined conventional expectations. Donald Trump would not have won this election unless poor- and working-class voters in states like Michigan, Pennsylvania, Ohio, North Carolina, and Wisconsin had defected from the Democratic Party in favor of his disruptive campaign, and that movement would not have resulted in a Trump victory absent the auspices of the Electoral College.

This being the case, as predictably as there is and will remain pressure to dismantle the Electoral College, there will be strong resistance to any campaign in this direction. To understand why, it is useful to contemplate what a presidential campaign would look like if such contests were decided purely by the popular vote. Candidates would focus almost entirely on the densely populated coasts to the exclusion of the interior, and on urban centers to the exclusion of more sparsely settled rural districts. By giving disproportionate leverage to more rural and sparsely populated states, the Electoral College forces candidates to wage truly national campaigns and to float policies that can win the votes of more marginalized citizens.

The 2016 election provides an object lesson in these redistributive dynamics. Hillary Clinton won the popular vote in California by 4.26 million votes. Thus if one eliminates California's total from the national tally, Donald Trump wins the national popular vote

by 1.4 million votes. This is a reflection of the fact that the Electoral College weights the popular vote of smaller and less densely populated states heavily, such that a vote cast in West Virginia is worth three times that of a vote cast in California. While that disparity might seem strangely arbitrary, to citizens in West Virginia, which has a per capita GDP of $38,567, it no doubt feels very fair that their votes should count more than those of their compatriots in California, who enjoy a per capita GDP of $61,924. In light of these facts we can see that in the 2016 election, the system as currently constituted has (or at least will be perceived as having) delivered a shocking victory to rural and industrial working-class voters over coastal elites, one that they would never have achieved in the absence of the Electoral College. For this reason, any move to eliminate this institution will be perceived as an attempt at the kind of "rigging" so loudly decried by the more acrimonious rhetoric of the recent campaign.

As votes continue to be counted and Hillary Clinton's lead in the popular vote widens, anger at the mechanics of the Electoral College will no doubt increase. In contemplating the situation, however, we must clearly understand that the elimination of the Electoral College cannot be taken for granted as an obvious "fix" to a quaintly arcane and obsolete institution. Reversion to the popular vote to decide presidential elections is and would be a drastically radical change to our larger social contract, one that materially impacts the interests of millions of citizens and significantly redistributes power across the political terrain. There are good philosophical arguments to be made against the "unfairness" of the Electoral College, but the historical experience of China demonstrates that there are likewise good practical and even ethical arguments on the other side of the issue. We must acknowledge and account for all of the consequences of changing the current system as we debate the issue moving forward, and undertake any such discussion in a spirit of extreme sensitivity to the interests of *all* groups that would be affected by any reform.

Section Two
The Electoral College in Historical Perspective

I.5.

What the Founders Were Thinking: Why We have the Electoral College*

Andrew Shankman

Never in our lifetimes has the Electoral College commanded so much attention. In arguing about what the Founders' original intent was in creating it, and whether electors would defect from their state's popular vote, supporters and opponents of Donald Trump have shown little knowledge of the Electoral College's history. Both sides do not understand that the Founders' Electoral College quickly became a source of chaos, causing the nation to abandon it fifteen years after ratifying the Constitution. The second version of the Electoral College that replaced the first in 1804 solved a destructive problem, but created a new and likely fatal one that we have lived with ever since. Now that the electoral vote has diverged from the popular vote in 40% of the elections conducted during the twenty-first century, the problem is nearing a crisis. We need a clearer understanding of the origins and history of the Electoral College to understand why it is contributing to our current bitter division—and what we should do about it.

Created by the Constitution, the original Electoral College worked like this: each state appointed electors equal to its number of senators (2) plus representatives, apportioned at a ratio of 1 for every 30,000 residents. Each elector cast two votes for president and at least one of those votes had to be for someone outside the elector's state. If someone received the most votes and a majori-

* A version of this essay appeared as Andrew Shankman, "What Were the Founders Thinking When They Created the Electoral College?" *History News Network*, November 28, 2016, http://historynewsnetwork.org/article/164514.

ty, he became president. The second-highest vote-getter became vice president. If no one received a majority, the decision went to the House of Representatives, which could choose the president from among the top-five vote-getters, and had to make the highest vote-getter vice president if they chose not to make him president. To us these original procedures may sound insane; in 2016, they would make majority vote-getter Donald Trump president and Hillary Clinton vice president.

So, what were the Founders thinking? The Founders were inspired by the classical republics of Greece and Rome and believed they had collapsed when they stopped seeking the public good as their citizens divided into parties to pursue their own interests. For the Founders the public good emerged from a coherent set of values, and understanding how to achieve it required a deep knowledge of the classics, of natural law, common law, and the law of nations, and of the new science of political economy that arose during the Enlightenment. Above all, one had to possess disinterested virtue—putting aside personal interests for the sake of the public good. The Founders thought that most citizens were not capable of fully comprehending the public good. For the United States to succeed, the small group of great and talented men who could would have to guide them. Believing in a unifying singular public good, the Founders saw no value in political parties. Parties existed to promote competing interests, which was contrary to the public good. Citizens either embraced the public good or they behaved selfishly and badly.

Only by starting with these assumptions did the Electoral College make sense. After George Washington's presidency, the Founders assumed their Electoral College would routinely place the decision of who would be president with the House of Representatives. They reasoned that the small group capable of comprehending the public good was evenly distributed geographically. A reasonable number of them would stand for election. Each would be equally qualified virtuous gentlemen. Without political parties to inflame passions and mobilize voters into a few large groups, only rarely would a candidate gain majority support in the Electoral College. The Electoral College would helpfully sort out five

from the larger group of the equally qualified, but usually would do little more than that.

Yet almost immediately after ratification of the Constitution, reality obliterated the Founders' plan. Bitter divisions over Hamilton's financial system and the French Revolution showed that Americans violently disagreed with each other. By 1796 two political parties had formed to support or oppose the current course of the nation's domestic and foreign policies and to compete for the presidency. Divided Founders became adversarial party leaders. With large regional, even national, voting blocks, it was suddenly highly likely that the leader of one of the two parties would gain a majority in the Electoral College. The Electoral College would now do what the Founders never imagined it should routinely do—determine the presidency. And the new president's most powerful critic, the leader of the opposition party, would likely get the second-most electoral votes, become the vice president, and bring bitter partisan rancor into the heart of the executive branch. This bizarre outcome happened in 1796 when Federalist John Adams was elected president due to receiving the majority of electoral votes, and his opponent, Democratic-Republican Thomas Jefferson, became vice president. In 1800, Jefferson's electors were so disciplined that they cast each of their two votes for him and for Aaron Burr, who they planned to make vice president. The result was that both received the same number of votes while finishing ahead of their Federalist opponents, leading to a prolonged constitutional crisis during which Pennsylvania's governor contemplated marching his state militia to Washington D.C. to prevent anyone other than Jefferson from being inaugurated.

By 1800, democracy and political parties had made the Electoral College an instrument of chaos. It led in 1804 to passage of the Twelfth Amendment, which required that electors stipulate a vote for president and for vice president. In abandoning the Founders' vision for the Electoral College, Americans were admitting that they did not live in the sort of republic where the Founders' Electoral College made sense: one where virtuous gentlemen pursued the singular unifying public good about which they all agreed. In altering the Electoral College as they did, Americans of

the early nineteenth century left us a hybrid and confused version of the original. Requiring electors to vote for a president and a vice president on a single ticket was a concession that party political conflict was never going away. Yet though political parties and democratic conflict were now acknowledged to be the driving force in American politics—that getting the most votes was what mattered—those parties would simply have to trust to luck that their votes were distributed in just the right way to gain an electoral majority.

Over time the Electoral College has become increasingly dysfunctional. As the nation's population grew, in the twentieth century we limited the number of representatives to 435 to prevent the House of Representatives from becoming absurdly large. The total number of electoral votes is capped at 538 (senators plus representatives plus three votes for the District of Columbia) and 153 are distributed away immediately since all states must have a minimum of three. The remaining 385 are distributed by population, which grows ever more distorting as the 385 total remains constant while the population grows. In 2014, California's population amounted to 66 Wyomings. Wyoming has three electors and California 55. But to ensure that a vote from California counted as much as one from Wyoming, California would need 199.

The hybridized confusion has led to our current schizophrenia. Trump supporters demanded that electors obey the popular vote within their states. At the state level the popular vote must be respected so that at the national level the popular vote can be ignored. This selective devotion to the popular vote is a legacy of the confusion that resulted when the Founders created an institution that made sense only for conditions that it quickly turned out did not exist. In 1803, Americans merged the Electoral College, an institution that only made sense in a world without partisanship and organized political parties, with a political process and a political culture based on partisan conflict organized by political parties. Rather than allow chronic chaos in their Republic, the Americans of 1803 abandoned the Founders' Electoral College. To avoid chronic chaos in our Republic, we must abandon the Electoral College entirely.

1.6.

Did Disenfranchisement Give the South an Electoral Advantage?*

Patrick Rael

There has been much recent discussion of the three-fifths clause of the Constitution,[1] which boosted slaveholding states' representation in the Electoral College by including for apportionment a population that received no benefits from government. Scholars have debated how this influenced national politics under slavery, but this conversation applies to the post-emancipation world as well.[2]

Let us start in 1860. With the three-fifths clause operating, the slaveholding states controlled 120 of 303 electoral votes (EV), or 40%. The free states desired a "0/5" scenario, in which slaveholding states received no representation benefit for the enslaved population. In this case, the South would have controlled only 35% of all EV. In 1860, the three-fifths clause thus gave the South a substantial 5% bump.[3]

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* A version of this essay appeared as Patrick Rael, "Did Disenfranchisement Give the South an Electoral Advantage?" *Journal of the Civil War Era* (blog), December 13, 2016, http://journalofthecivilwarera.org/2016/12/disenfranchisement-give-south-electoral-advantage/.

[1] For a brief summary, see Wikipedia contributors, "Three-Fifths Compromise," *Wikipedia, The Free Encyclopedia*. Accessed December 31, 2016. https://en.wikipedia.org/w/index.php?title=Three-Fifths_Compromise&oldid=754867751.

[2] See, for example, "Slavery, Democracy, and the Racialized Roots of the Electoral College," AAIHS (November 14, 2016); "Is slavery the reason for the Electoral College?" CNN.com (November 22, 2016); "Yes, The Electoral College Really Is A Vestige Of Slavery. It's Time To Get Rid Of It." WGBH News (December 6, 2016).

[3] All figures based on my analysis of data from *Historical Statistics of the*

Under the South's desired "5/5" scenario — the one in which all slaves counted for representation — the South would have controlled 42% of all EV. That is a more modest bump of 2% (about 7 EV) over what it actually enjoyed under the 3/5 ratio.

Emancipation enhanced the South's share of national power by propelling 3.9 million former slaves into the ranks of the population used as a basis for apportionment. With slavery gone, each former bondsperson would now be counted as a whole person rather than three-fifths of one. In principle, this was a "5/5" scenario, in which all people (former slaves among them) were considered for purposes of representation.

In the 1872 election cycle, which was the first to rely on post-emancipation census figures, the South controlled 138 of 366 (38%) EV. Had former slaves not been included (a "0/5" scenario), the South would have controlled only 90 of 319 (29%) EV. The emancipated freedpeople thus gave the South a 9% bump in representation in the Electoral College.

It was good that emancipation boosted southern political power so long as those added to the apportionment population had access to the political process through the 14th and 15th Amendments, which granted citizenship to African Americans, and the franchise to black men. But under conditions of complete disfranchisement, which southern states came close to making around the turn of the 20th century, no African Americans received direct representation in Congress.[4] At that point, emancipation's boost in

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United States, Earliest Times to the Present: Millennial Edition, Susan B. Carter, Scott Sigmund Gartner, Michael R. Haines, Alan L. Olmstead, Richard Sutch, and Gavin Wright, eds. (New York: Cambridge University Press, 2006); "Inter-university Consortium for Political and Social Research. Historical, Demographic, Economic, and Social Data: the United States, 1790-1970 (ICPSR 3)," [Computer file] (Ann Arbor, MI: Inter-University Consortium for Political and Social Research, 197?).
A note of caution: there are many ways of building counterfactual scenarios with these numbers. I have made some plausible but not airtight assumptions, such as that the apportionment basis for each cycle would not change despite having fewer people in the apportionment population. Bottom line: republish these numbers at your own risk.

[4] Absolute disfranchisement was the goal, but it was rarely complete. I

Southern power worked (some might say ironically) against African Americans, who struggled against racist state regimes whose disproportionate strength in national government blacks' presence was artificially inflating. Imagine trying to get federal anti-lynching legislation passed against Southern states that had worked to remove blacks from the voting population, and were stronger than they should've been because of it.

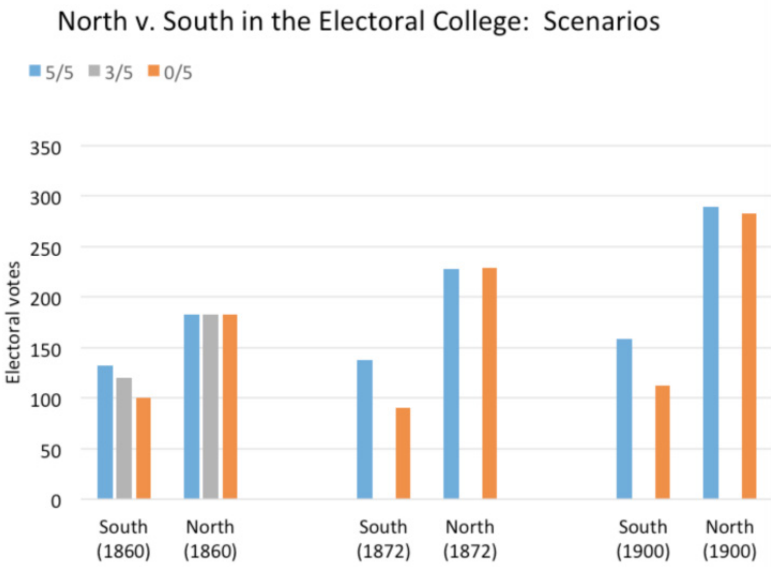
By 1900, African Americans were being largely expelled from the political process. Their concerns went unrepresented, and yet their numbers still boosted Southern representation in the Electoral College. Effectively, the country ran on the "5/5" principle even though the reality was that close to "0/5" of blacks could vote for their own representatives.

In slavery, this desire had resulted in the diminishment of Southern power. At the Constitutional Convention in 1787, representatives from northern states had bargained the South down to counting only three-fifths of each slave for representation. After the war, Republicans had sought to carry this principle into freedom by Section 2 of the 14th Amendment, which provided for the diminishment of a state's enumerated population in proportion to the proportion of voters it disenfranchised. That failed, though, as did the 15th Amendment's voting protections, when the Supreme Court began (from the 1870s on) permitting ostensibly race-neutral but intentionally race-specific disfranchisement measures. This gave white supremacists the best of both worlds — they received the enhanced political power that went with a larger population, without the obligation to serve that population.

The numbers for 1900 bear this out. In the "5/5" reality, the states that had held slaves in 1860 ("the South") had 159 EV, or 35% of the total. Under a "0/5" scenario, in which the South would lose representation for the blacks it refused to enfranchise, the South would have had only 112 EV, or 28% of the total.

The South thus gained a lot from disenfranchisement. At the turn of the century, its largely disenfranchised African Americans gave it a 7% bump in the Electoral College, which was one even

make no claims here about how many were *actually* disenfranchised. This is about hypothetical extremes.



Information from Susan B. Carter et al., eds., *Historical Statistics of the United States, Earliest Times to the Present: Millennial Edition* (New York: Cambridge University Press, 2006).

larger than the 4-5% bump the three-fifths clause usually gave under slavery. And, as before the war, this was a population included *only* to boost representation, for it could make virtually no claim on the political process at all.

The Electoral College has always provided the ruleset for selecting the President of the United States. The framers of the Constitution hoped that this membrane between the voters and the office of President would insulate the electoral process from the "heats and ferments" of public opinion, as Alexander Hamilton put it in *Federalist* No. 68.[5] But the cost has been high, for anti-democratic politicians have always been willing to game the system. One might have thought that ending slavery would have ended the compromise embodied in the three-fifths clause — a system that John Quincy Adams came to call "morally and politically vicious."[6] It was not to be. Of the many paradoxes to the

[5] James Madison, *Federalist* No.68, see the Documents section.

[6] Josiah Quincy, *Memoir of the Life of John Quincy Adams* (Boston: Crosby, Nichols, Lee and Co., 1860), 108-9.

"freedom" that followed slavery, one of the most neglected may be this: in the era of Jim Crow, ending slavery only made the white South stronger.

I.7.

Citizenship, Civil Rights, and Electoral Politics

Cynthia Culver Prescott

The United States is a democratic meritocracy. Or so we like to believe. While the general trajectory has been toward greater political and social equality, progress has been uneven. Government policies have made the American dream open to many, while disadvantaging or deliberately excluding others. The American West has long been imagined as land of rugged egalitarianism, but white settlement actually exacerbated inequality in important ways. Although the U.S. has had an egalitarian streak since its founding, Americans have also deep reservations about sharing power equitably. This enduring tension between egalitarianism and deep-seated distrust of the American people may help explain the resilience of the remarkably undemocratic Electoral College.

In the decades following our nation's founding, many people residing within the boundaries of the United States did not qualify as citizens entrusted with the vote. Property laws and poll taxes ensured that only the worthiest—read: wealthiest and whitest men could vote. White women were counted for representation purposes in the legislature and the Electoral College, but they could not vote. Under coverture, married women's legal personhood was absorbed by her husband. Native Americans and African Americans, among others, enjoyed few rights. And, of course, slaves were only counted as three-fifths of a person for representation purposes, and were treated as chattel rather than as citizens with political rights.

Over the past two hundred years, our nation has expanded the privileges of citizenship to more and more Americans. African Americans gained citizenship in 1868 and Native Americans in

1924. Women gained the right to vote in 1920. African-American suffrage was enshrined in the Constitution in 1870; nearly a century later, the Voting Rights Act of 1965 removed legal barriers against Blacks exercising the franchise. We have made our representative democracy more direct over the past two centuries, particularly through the direct election of senators (1913). Initiative, referendum and recall powers were also introduced in many states during the early twentieth century.

Viewed in this context of expanding political rights and greater power for American voters, the Electoral College system appears anachronistic. But our nation's path toward inclusivity has not been as smooth, nor our inclusivity as complete, as we like to believe.

During the nineteenth century, American women steadily gained political and economic rights. But when women were granted suffrage or married women the right to own property separate from their husbands, those gains were often motivated not by a belief in women's equality, but out of male self-interest. Granting women rights became a means to strengthen a particular group's political influence, or to protect familial property. And only native-born white women benefitted from many of these privileges.

Following the Civil War, Radical Republicans sought to reconstruct the social fabric of the South, including granting citizenship and suffrage to African Americans. But those gains were short-lived, as white southerners adopted Jim Crow laws, literacy tests, and other means to limit African-American rights. The 1965 Voting Rights Act finally outlawed these discriminatory practices, but in recent years laws supposedly targeting voter fraud have suppressed voter participation among people of color and both the rural and urban poor.

Third U.S. President (and elite slaveholder) Thomas Jefferson envisioned a nation of yeoman farmers that would serve as the basis of American democracy. A century later, historian Frederick Jackson Turner similarly declared that the western frontier's wide open spaces and supposedly free land formed the basis of American democracy. Many nineteenth-century Americans agreed, and this vision shaped many aspects of federal policy for generations.

For example, Jeffersonian agrarianism motivated both the Louisiana Purchase and the Homestead Act. But like our history of expanding civil rights, the legacy of Jefferson's vision is complex. Only people of some means could afford to migrate west to claim land. More than half of claimants failed to prove up on their land. Western lands often wound up in the hands of speculators rather than family farmers. Moreover, white settlement in the West was predicated on the forced removal of native peoples. Indigenous peoples' lives were disrupted or destroyed to enable certain whites to become good democratic citizens.

But even as the U.S. government fought wars and displaced Native Americans to ensure a nation of independent men, many Americans distrusted those western democrats. Painter George Caleb Bingham captured this tension in his famous 1852 painting *The County Election*. Although a blue banner declares "The will of the people is the supreme law," the raucous scene highlights the influence of party politics, money, alcohol use, and even violence on voters – all of them white men, of course. Young boys play with a knife in the dirt and a stray dog wanders through the crowd, but women and people of color are excluded from participation.

Bingham's painting celebrated the participation of white men from different social classes in western elections. But participation by both wealthy businessmen and workingmen does not mean that nineteenth-century elections were egalitarian. Party-specific tickets were cast publicly. *Viva voce* voting persisted in some states. While speaking their choices out loud rather than marking a paper ballot made it possible for illiterate men to participate, it also made them particularly vulnerable to pressure from the political and economic elites.

American agrarian ideals were redefined in the twentieth century. Rather than dreaming of owning an independent family farm, Americans increasingly dreamed of owning a ranch home surrounded by a green lawn in the suburbs. Homeownership replaced homestead ownership at the core of the American dream. Like nineteenth-century land claim laws, government policies enabled wealthier white Americans to buy homes in these suburbs at the expense of others.

For all our faith in Jeffersonian agrarianism as the basis of a free, democratic society, Americans have remained suspicious of the people who make up that republic. Perhaps this tension between trust and distrust explains our pendulum swings between growing civil rights and disfranchisement, and our continued reliance on the Electoral College. Ironically, western lands that were supposed to breed democracy instead have become among the most inequitably treated under the Electoral College system. Due to uneven population distribution, ethnically diverse California and Texas voters are grossly underrepresented in the Electoral College, while heavily white Wyoming and North Dakota voters are overrepresented. And nearly all western states have become among the most reliably "red" or "blue," thus limiting their impact on the presidential election. In recent presidential elections, the Electoral College system has ensured that a few "battleground states" – and especially white suburban men and women – have determined the outcome of the presidential election. In 2016, rural Americans in Midwestern "swing states" consistently voted for Donald Trump, while urban populations supported Hillary Clinton. White suburbanites proved to be the swingiest of swing voters, and they won the Electoral College for Trump, despite Clinton's two percent advantage in the popular vote. Our policies ensured that white suburban homeowners living in an earlier trans-Appalachian West would select the next President of the United States.

Americans are not as equal nor as egalitarian as we like to believe. The persistent tension between egalitarianism and distrust of individuals (especially women and ethnic minorities) contributed to our uneven progress toward social equality, and may help to explain the tenacity of the unequal Electoral College system.

I.8.

Quantifying a Candidate's Advantage in the Electoral College

Timothy Prescott

The Electoral College currently functions as a compromise between big states (who would like to see votes weighted proportionally to their population, as in the House of Representatives) and small states (who would like each state to count equally, as in the Senate). Nationally, there are about 600,000 people for each elector. But in the most extreme example of this weighting, Wyoming, there are just under 200,000, so that each Wyoming resident is about three times as powerful on the national stage.

Despite this, the biggest reason for the disparity between the popular vote and the Electoral College is the fact that every state, except for Nebraska and Maine, awards all of its electors to the winner of that state. This means that a candidate could hypothetically lose the popular vote 25% to 75%, but because they eked out victories in over half of the states, they could still win the Electoral College. In fact, by concentrating on less populous states (currently the 40 smallest), it is possible to push this down to winning with less than 23% of the popular vote.

This leads us to consider how candidates have historically done in the Electoral College as compared to the national popular vote (assuming all electors vote as pledged). As the national popular vote increases, we'll distribute the votes proportional to that candidate's eventual support in each state, with each state and its electors tipping one by one to the candidate's side when the distributed votes eclipses the opponent's eventual total. The state that finally provides the candidate with a majority in the Electoral College determines the election. We'll call that state the *clinching*

state, and the difference between the clinching state's margin of victory and the candidate's actual margin of victory their *electoral advantage*.

For example, in the 2016 election, Donald Trump won the Electoral College by 74 votes, but lost the popular vote by 2.09%. He could have lost Michigan and Pennsylvania and still won the Electoral College by 2 votes; it was Wisconsin with its margin of .76% that clinched the Electoral College. Therefore, Trump could have done .76% worse, lost the popular vote by 2.85%, and it would have been Wisconsin that clinched the election. We will say that this means Donald Trump had a 2.85% electoral advantage.

In contrast, in 2004 Bush won the popular vote by 2.46%. If he had done 2.11% worse in every state, he would have won the popular vote by .35%, lost Iowa and New Mexico, and the winner of Ohio would have clinched the Electoral College. We'll say that this means Bush had a .35% electoral disadvantage (or a -.35% electoral advantage). (In our hypothetical examples, the winning candidate had a 50% and 54% advantage.)

Over the last 26 elections (going back to Wilson's defeat of Hughes in 1916), there have been 9 elections where the difference in the popular vote was less than 5%, so that we find it meaningful to talk about a candidate's electoral advantage. Ranking them by the winner's advantage, those elections are:

Year	Winner	Electoral Advantage
2016	Trump	2.85%
1968	Nixon	1.58%
2012	Obama	1.51%
2000	Bush	0.52%
1960	Kennedy	0.35%
2004	Bush	-0.35%
1976	Carter	-0.38%
1916	Wilson	-2.74%
1948	Truman	-4.04%

We observe the following:

- Donald Trump had the best electoral advantage of any victor.
- Truman's surprise victory in 1948 is all the more impressive given that he overcame the worst electoral disadvantage.
- In these elections, the Republican candidate averaged a 1.10% electoral advantage.

This last point is worth further investigation. It is likely a combination of Republicans tending to do better in rural states (which tend to have more electors relative to their size) and Democratic candidates running up the score in more populous urban states (which helps with the popular vote, but not with the Electoral College).

Section Three
The Future of the Electoral College

1.9.

If the Electoral College Can Contradict the Popular Vote Sometimes, Why Would It Be Wrong for Them To Do It Every Single Time?*

Jack Russell Weinstein

In my role as a public philosopher, I received a question from one of my blog readers asking about the independence of the Electoral College.[1] The person wrote:

> Long before the election, my class was discussing the Electoral College, and one student opined that it should be kept because the popular vote doesn't accord with the electoral vote only some of the time. This got me thinking, "Would we find it acceptable if the popular vote never matched the electoral vote?" It would seem that whatever makes it acceptable to have the popular vote not match the electoral vote in some instances, would also make such an outcome acceptable in every instance. Or, conversely, whatever makes it unacceptable to have the popular vote not match the electoral vote in every instance, would also make such an outcome unacceptable in each instance. But perhaps I'm missing something, so I thought I'd see what you have to say in regard to the argumentation.

To put the question another way: if it is okay for the Electoral College to contradict the popular vote once in a while, why isn't it okay

* A version of this essay appeared as Jack Russell Weinstein, "If the Electoral College can contradict the popular vote sometimes, why would it be wrong for them to do it every single time?" *PQED: Philosophical Questions Every Day* (blog), November 28, 2016, http://www.pqed.org/2016/11/if-electoral-college-can-contradict.html.

for it to do so all the time? How can opposing the popular vote be right only some of the time?

This is a good, philosophically interesting, and relevant question. To answer it, we first have to ask why we have an Electoral College in the first place, although, surprisingly, there isn't a consensus on this basic fact.

One theory is that the Electoral College was intended to give an equalizing voice to a region of slaveholders with a smaller white population. There is some evidence for this. James Madison himself seemed concerned that "the right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of Negroes" (Constitutional Convention, July 19, 1787).[2] In other words, since there were more Northern than Southern voters, without the Electoral College, the South would not be able to protect its right to maintain slaves.

Some cite Madison's argument as a case against the very legitimacy of the Electoral College itself, but such a critique isn't persuasive. It runs afoul of the Genetic Fallacy, the observation that the truth or validity of a conclusion does not depend on its history or origin. Why the Electoral College came into being is irrelevant to its current purpose. GPS was invented for the military, yet many peace activists still use it. Adolf Hitler designed the Volkswagen Beetle (although one scholar argues that Hitler stole it from a Jewish engineer),[3] yet people who drive them do not necessary subscribe to his fascist philosophy. Similarly, just because the Electoral College may have been in support of slavery at one time does not mean it is now.

In fact, the real remedy for the Southern states' disproportionately small influence was the Three-Fifths Compromise found in Article I of the U.S. Constitution. Also proposed at 1787 Con-

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[1] *PQED: Philosophical Questions Every Day* (blog) http://www.pqed.org/.

[2] James Madison, "July 19, 1787," in *Notes of Debates in the Federal Convention of 1787*. See Documents section.

[3] Paul Schilperoord, *The Extraordinary Life of Josef Ganz: The Jewish Engineer Behind Hitler's Volkswagen* (New York : RVP Publishers, 2012).

stitutional Convention, this clause declared that slaves should be counted as three-fifths of a freeperson for voting and taxation.

The Compromise is frequently and understandably touted as a philosophical synecdoche of American racism. But it's purpose was not to reduce the humanity of the slave to less than one as it is usually described; it was to *give* a slave some electoral power in the first place, and, by extension, the electoral power of the South.

Naturally, I do not mean to suggest that the Compromise is not racist. It is. Slaves did not actually vote; slaveholders simply justified their additional electoral power on the backs of slaves using the Electoral College to consolidate their power. My point is simply that people tend not to understand its origins, giving credence, yet again, to the Genetic Fallacy, and making slavery less important to *today's* debate about the Electoral College. Once slavery was abolished in 1865 and the Three-Fifths Compromise rendered obsolete, this aspect of the Electoral College remained historically important but functionally irrelevant.

Another popular justification for the Electoral College also stems from the Madison debate: that it is a kind of "affirmative action" for rural voters. Given the different population densities of urban and agricultural regions, the Electors are supposed to equalize the power of voters across the country. This is the same sort of justification the framers used when apportioning two senators per state regardless of their size, while basing the number of representatives in the House on population. Without it, many claim, urban populations would determine all national elections.

This notion of the Electoral College emphasizes the lack of direct democracy in the Federal system. It echoes the Three-Fifths Compromise in that it holds that for votes to be equal, they need not be identical. Equality necessitates proportional, not uniform, representation.

But there is a problem with continuing to justify the Electoral College on these grounds. First, it assumes that rural voters have inherently different interests than urban voters, a generalization that simply doesn't hold. Political positions must be evaluated on a case-by-case basis, there is no reason to think that living in the country or the city would affect one's position on internation-

al relations, abortion, interstate commerce, net neutrality, or the vast majority of issues that concern government policies. It may affect one's position on agricultural issues, but even there, farmers disagree on ethanol, genetically modified seeding, and the importance of monoculture farming, to name just a few controversies.

People also tend to assume that rural voters are necessarily more conservative than urban voters, but this is simply not the case. For many decades, Appalachia was a Democratic stronghold. It isn't anymore; it changed. But that just proves my point. And while much has been made of the "traditional" family farm, there are few populations that are more embracing of technological change and government subsidies, and more suspicious of school choice than small farmers. ("Vouchers" and charter schools are untenable in rural areas where many towns share a single school.) The rural and urban electorate can simply not be cleanly divided into conservative and liberal, no matter how much lip service is given to the so-called "real America."

Regardless of all of these considerations, if increased representation of the rural is the reason for the Electoral College, then it simply failed to do its job in 2016. It did not magnify the agricultural voice; it increased the influence of the suburbs instead. As Joel Kotkin and Wendell Cox summarize in Forbes magazine, it wasn't alleged rural racism that rocketed Trump to power, it was the suburban five-point lead, a three-point increase from Romney in 2012.[4]

To summarize: if slavery is the reason for the Electoral College, we can't answer the reader's question at all and if voter equity is the reason, then all we have learned is that the Electoral College has failed. We do not yet know whether there is a moral difference between the college opposing the popular vote sometimes and it differing all the time.

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[4] Joel Kotkin and Wendell Cox, "It Wasn't Rural 'Hicks' Who Elected Trump: The Suburbs Were -- And Will Remain -- The Real Battleground," *Forbes*. November 22, 2016. Accessed on December 31, 2016. http://www.forbes.com/sites/joelkotkin/2016/11/22/donald-trump-clinton-rural-suburbs/.

However, the answer to the reader's question can be found, I think, in what I have always understood as the true purpose of the Electoral College: to be an educated body in the face of an uneducated public. From Plato onward, one of the most trenchant criticisms of democracy has been that public policy is simply too complex for the average person to understand. One needs both special training in political reasoning, the argument asserts, as well as to be able to emancipate oneself from private interest to qualify as enlightened voter.

This is the tradition that Hamilton calls upon in *Federalist* No. 68 when he wrote: "electors should be men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation…[they would be] most likely to have the information and discernment" required to choose the president.[5] Ultimately, he argued, the presidency should be determined by the most *qualified* voter, not by people who vote simply because they are *eligible*.

What might have Hamilton meant by these comments and how does this change the role of the Electoral College? There are, it seems to me, two possible interpretations—and two possible answers to our main question—depending on whether this layer of qualified electors are to be regarded as insurance or as a representative body.

Let's begin with the first interpretation, that is, that the job of the Electoral College is to be a last-ditch effort to protect the country from a demagogue who fools the public into voting for him or her. If this is the case, then the Electoral College should be regarded as an insurance policy and, as with all insurance, we hope never to have to use it. We buy insurance hoping to waste our money.

Under this interpretation, if the Electoral College contradicts the popular vote with good reason, we should celebrate their choice. However, if it does so under conditions different than its prescribed safeguard, if, for example, the candidate is not dangerous or a demagogue, but simply won because of the vicissitudes of

[5] James Madison, *Federalist* No. 68, in *The Federalist Papers*. See Documents section.

electoral politics, then such a decision is to be deplored and the presidency is illegitimate. This illegitimacy is, however, something we have to put up with to preserve the protection we might someday need. In such a case, a president who did not win the popular vote is the "price we pay" for the Electoral College.

In other words, if we consider the Electoral College as an insurance policy against demagoguery, the justification for the Electoral College is utilitarian. We are willing to accept some bad stuff for the greater good. An occasional disagreement between it and the popular vote can be justified, but continual disagreement cannot.

My personal feeling, by the way, is that this is the true purpose of the Electoral College. Since it did not protect us from Trump, it will never protect us from anyone and can no longer be justified. Even more so, since one of Hamilton's specific concerns was that the vote might be corrupted by "foreign powers to gain an improper ascendant in our councils," it failed in its very specific mandate.[6] As a preponderance of evidence has shown, Russia significantly influenced the election, orchestrating a Clinton loss despite her popular-vote landslide. The Electors knew this but disregarded it, emphasizing that the Electoral College no longer plays its intended part as insurer. It has become, instead, a tool for partisan sidestepping of the popular vote.

The second possible interpretation of Hamilton's preference for educated electors over the general population leads to a deontological justification for the Electoral College—it builds on a principle that allows for no exception. It puts forth the idea of representative government in its strongest from, regarding electors themselves as agents akin to all of our officials, not simply protectors with narrow mandates whom we call upon in very specific situations.

If we regard Electors as representatives—if we see them like Congress members or as specialists who have more refined political senses than the layperson—then we have to think of the popular vote as only advisory rather than binding. In other words, when the general populace votes and expresses its will, the Electors ought

[6] Madison, *Federalist* No. 68. See Documents section.

to consider it as only one of many factors, and then vote based on their personal (allegedly professional and educated) judgment. This may or may not assume their personal judgment is better, but it does regard their representative role as having more *authority* to choose the president than an average voter.

There are, incidentally, good and convincing fictional portrayals of this point of view. In an episode of *The West Wing* titled "The Lame Duck Congress," when faced with deciding whether to approve a nuclear treaty against the wishes of 82% of the voters, the fictional President Bartlett says:

> Can I tell you something, honestly? This is one of those situations where I couldn't give a damn what the people think. The complexities of a global arms treaty, the technological, the military, the diplomatic nuances, it's staggering, Toby. 82% of the people cannot possibly be expected to reach an informed decision.

Bartlett's point is taken significantly farther by President Andrew Shepherd, in the movie *The American President*:

> **Lewis Rothschild**: …People want leadership, Mr. President, and in the absence of genuine leadership, they'll listen to anyone who steps up to the microphone. They want leadership. They're so thirsty for it they'll crawl through the desert toward a mirage, and when they discover there's no water, they'll drink the sand.
>
> **President Andrew Shepherd**: Lewis, we've had presidents who were beloved, who couldn't find a coherent sentence with two hands and a flashlight. People don't drink the sand because they're thirsty. They drink the sand because they don't know the difference.

If this point of view is correct and if the American population is simply not educated enough to make good democratic decisions, then the popular vote is simply advisory to the Electoral College

rather than binding. And, if this is the case, the College's decision is, by definition, always right. It and only it, has the job of choosing our president. In such an interpretation of Hamilton's words, there is no such thing as an electoral vote that contradicts the popular vote, just one that considered it and moved on.

One final observation: differing attitudes about voter knowledge is a point of contention in the debate between John Locke and Jean Jacques Rousseau, the patron saints of American and French democracy, respectively. The role of individual perspective marks a dividing line between the American notion that people's beliefs about their own interest is more important than their generalized knowledge, and the French democratic model, which assumes that personal interest is secondary to collective understanding, or the Republic's interests. Hamilton's view of the Electoral College as permanent representative seems to fit more with the French model than the American one, suggesting, yet again, that the Electoral College is inconsistent with American democratic values. It seems to me that the given all we have discussed, the only viable justification for the Electoral College is one based on its role as insurance against demagoguery and, as we have seen, it has failed in its role. Certainly, this conclusion is based in part on my own political leanings, but that doesn't make it wrong. Perspective and bias are not the same thing.

Nevertheless, to sum up my rather lengthy answer to the reader's question: if the Electoral College is insurance, then we have to put up with a couple unjustified conflicts in order to protect ourselves against potential serious dangers. In such a case, the Electoral College must agree with the popular vote in most but not all instances, and when it doesn't, we have to regard it as a necessary evil.

But if the Electoral College plays a representative role and the general popular vote is advisory, then it is theoretically possible for the Electoral College to disagree with the majority every single time and still be legitimate. In this case, the popular vote will always be secondary to the judgment of its representatives. Or, as President Bartlett puts it immediately after his comment above: "…we forget sometimes, in all the talk about democracy, we

forget it's not a democracy, it's a republic. People don't make the decisions, they choose the people who make the decisions. Could they do a better job choosing? Yeah. But when you consider the alternatives,…"

As is hopefully evident, the reader's question goes to the heart of the American experiment. Are we a democracy or a republic, and if we are one or the other, is it what we were supposed to be or just what we ended up as? The Genetic Fallacy makes original intent a less powerful argument for any constitutional interpretation, but it doesn't make it less interesting. Whatever damages the Electoral College may or may not have inflicted this time around, the fact that it has given us an opportunity to reflect on the nature of democracy is itself a gift worth celebrating.

I.10.

Electoral College is Fixable; Senate is Not.

Mark Trahant

The Electoral College was a huge mistake. It's anti-democratic. It's 18th century machinery designed to elect a government despite deep philosophical differences between states, regions, and cities. And, in a digital economy, the mechanics makes no sense.

But the funny thing is: The Electoral College is fixable.

If votes were counted proportionally, instead of winner-take-call, the results would be a lot closer to the popular will and still account for regional differences in thinking. (This reform would not require a Constitutional amendment, but all 50 states would have to agree.)

Indeed, the Electoral College gets the attention for being undemocratic when there are other issues in the American version of democracy that cry out for real reform.

Consider the notion of requiring a super-majority in the Senate (a filibuster-proof 60 votes). The Senate elects two members from each state. So California's 36 million citizens get two votes – exactly the same as Wyoming's 532,000 people. And the super-majority makes matters worse because senators representing a tiny slice of the population can block legislation that most Americans favor.

The Senate has a unique history and in that favorite argument used by so many, "we have always done it that way." But let's be clear about this, the structure of the Senate does not represent democratic values. Why does this matter? Especially when it's worked for more than two centuries?

The Senate ceased its claim to democracy in 1920 when the census showed that the United States had become an urban nation.

A century ago this did not matter because the values and priorities were largely the same; the opposite is true now. The greatest divide in our politics stems from this rural/urban split on issues ranging from natural resource extraction to climate change. Yet the Senate skews rural dramatically. It only takes 17 percent of the country to elect a majority in the Senate (and that's not even including the additional ten votes required for a supermajority.)

The House is not particularly democratic either. The United States is one of the few countries in the world that clings to a district system that can be manipulated by a political party. Districts are designed to favor incumbents or the party in power. In other countries, proportional representation insures that all constituent groups are represented in body politic. In a district system, however, the other party is often shut out from all elective offices in a state.

Could there be reform without a new Constitution? Perhaps. States could create multiple congressional districts. And California could split into two, three or even four states, to even out the Senate a bit. We need more representation, not less. So I'd like to see a Senate the size of the House now and a House of Representatives that was significantly larger in order to accommodate more points of view.

Democratic reform is critical when the U.S. preaches it as a value to the rest of the world. That means system reform, well beyond a quick fix to the Electoral College. And, who knows? After reform a proportional Electoral College could actually work. Even in a digital century.

I.11.

Long Habits and Legitimacy

Mark Stephen Jendrysik

"A long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom." When Thomas Paine said this in *Common Sense* (1776) he was speaking about monarchy, but he could have been saying it about the Electoral College (EC).[1] The EC might once have had a purpose, and it can be argued that the EC was necessary at the beginning of the republic to overcome the basic problems of time and space that made rapid communication of electoral results across a continent-spanning nation difficult if not impossible.[2] This constitutional feature was designed for a very different time.

Like other features of the United States Constitution such as state equality in the Senate, the EC is now an ossified remnant of a distant past that creates a crisis of political legitimacy every time the EC fails to ratify the popular vote. While this has only happened four times in the history of the country (1876, 1888, 2000 and 2016), current demographic and political division make it possible this outcome might become a regular event. If elections are repeatedly resolved in the EC to the detriment of popular majorities, possibly numbering in the millions, America will face a crisis of legitimacy. After all, why should the election of the president be

[1] T. Paine, *Common Sense*. Philadelphia: Printed. And sold by W . and T. Bradford [1776]). Accessed on December 31, 2016. http://xroads.virginia.edu/~hyper/Paine/common.html.

[2] It generally took at least two weeks to travel from New York to Charleston, South Carolina in 1800.

the only election where the majority (or plurality) does not determine the winner?[3]

Every argument in favor of the EC is made mindlessly, or in bad faith, or to cover up less than savory ideas. To co-opt George Orwell, the EC "can indeed be defended, but only by arguments which are too brutal for most people to face."[4] Mindless defenses of the EC pop up every four years. Repeatedly saying "We are a republic not a democracy" is not an argument, it is an incantation. Claiming the EC is a feature of state sovereignty ignores that fact that the states are not actually sovereign. Saying "that's how the Founders set it up, and they were greater men than we are" infantilizes those of us alive today. Such thinking makes us children, forced to forever obey the Framers, without volition or reason of our own. To paraphrase Paine, the Founders might as well have declared themselves immortal, since we now have no choice but to follow their will.[5]

Bad faith arguments in support of the EC are easy to find. Donald Trump's complaints about the EC turned to praise once he discovered it was working in his favor. We can also note people who say we can just amend the Constitution to get rid of the EC, while knowing full well that will never happen. Or we can consider the arguments of people in small states whose votes count for more than the voters of more populous states. Defending a weighted vote system requires a set of rather dubious and ultimately disturbing assumptions.[6] For example, saying that the EC protects the interests of rural areas against urban ones, suggests that some voters votes should have a greater weight. After all, "Real Americans ™" are the honest sons of the soil, not untrustworthy city slickers. As Michael Barone notoriously claimed, the EC protects the country

[3] In a similar sense, state equality in the Senate poses serious questions of legitimacy as well. Currently, somewhat less the 15% of the population controls over half the seats in the Senate, a trend which will only grow more extreme.

[4] G. Orwell, "Politics and the English Language," *Horizon* Vol. 13, No. 76 (April 1946), 261.

[5] See T. Paine, *Rights of Man* (London: Joseph Johnson, 1791) for a discussion of the absurdity of the idea that the dead can constrain the living.

[6] Or, maybe you believe that empty space should be allowed to vote.

from the rule of the voters of California, who, as we all know, don't represent or support real American values.[7] And so it is only just that their votes count for less in the EC.

The United States Constitution is an admirable document. But parts of it can be compared to a petrified forest, once alive and vibrant, now merely existing. Even worse, parts of it, in particular the EC, are like vestigial organs. Like the appendix, the EC is mostly harmless and unnoticed. But every once in a while, the EC reminds us of its existence and threatens the health and safety of the Republic. In a democracy, elections decided by less than a majority are, on their face, illegitimate.[8] Quite simply, choosing the single most important office in the world through anti-democratic methods leaves a ticking time bomb of disaster at the heart of our political system.

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[7] Michael Barone, "Ditching the Electoral College," *Washington Examiner*, December 4, 2016. Accessed December 31, 2016. http://www.washingtonexaminer.com/ditching-electoral-college-would-allow-california-to-impose-imperial-rule-on-a-colonial-america/article/2608766. The key paragraph: "California's 21st century veer to the left makes it a live issue again. In a popular vote system, the voters of this geographically distant and culturally distinct state, whose contempt for heartland Christians resembles imperial London's disdain for the 'lesser breeds' it governed, could impose something like colonial rule over the rest of the nation. Sounds exactly like what the Framers strove to prevent."

[8] There are over 500,000 elected officials in the United States. All of them, except the president are chosen by majority or plurality elections. David Nir, "Just how many elected officials are there in the United States? The answer is mind-blowing," *Daily Kos*. March 29, 2015. Accessed on December 31, 2016. http://www.dailykos.com/story/2015/3/29/1372225/-Just-how-many-elected-officials-are-there-in-the-United-States-The-answer-is-mind-blowing.

I.12.

In Defense of the Electoral College*

Allen Guelzo and James H. Hulme

There is hardly anything in the Constitution harder to explain, or easier to misunderstand, than the Electoral College. And when a presidential election hands the palm to a candidate who comes in second in the popular vote but first in the Electoral College tally, something deep in our democratic viscera balks and asks why the Electoral College shouldn't be dumped as a useless relic of 18th century white, gentry privilege.

Actually, there have been only five occasions when a closely divided popular vote and the electoral vote have failed to point in the same direction. No matter. After last week's results, we're hearing a litany of complaints: the Electoral College is undemocratic, the Electoral College is unnecessary, the Electoral College was invented to protect slavery — and the demand to push it down the memory hole.

All of which is strange because the Electoral College is at the core of our system of federalism. The Founders who sat in the 1787 Constitutional Convention lavished an extraordinary amount of argument on the Electoral College, and it was by no means one-sided. The great Pennsylvania jurist James Wilson believed that "if we are to establish a national Government," the president should be chosen by a direct, national vote of the people. But wise old Roger Sherman of Connecticut replied that the president ought to be elected by Congress, since he feared that direct election of presidents by the people would lead to the creation of a

*A version of this essay appeared as Allen Guelzo and James Hulme, "In defense of the Electoral College," *PostEverything* (blog), *The Washington Post*, November 15, 2016, http://www.washingtonpost.com/posteverything/wp/2016/11/15/in-defense-of-the-electoral-college/.

monarchy. "An independence of the Executive [from] the supreme Legislature, was in his opinion the very essence of tyranny if there was any such thing." Sherman was not trying to undermine the popular will, but to keep it from being distorted by a president who mistook popular election as a mandate for dictatorship.

Quarrels like this flared all through the convention, until, at almost the last minute, James Madison "took out a Pen and Paper, and sketched out a mode of Electing the President" by a "college" of "Electors … chosen by those of the people in each State, who shall have the Qualifications requisite."

The Founders also designed the operation of the Electoral College with unusual care. The portion of Article 2, Section 1, describing the Electoral College is longer and descends to more detail than any other single issue the Constitution addresses. More than the federal judiciary — more than the war powers — more than taxation and representation. It prescribes in precise detail how "Each State shall appoint … a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"; how these electors "shall vote by Ballot" for a president and vice president; how they "shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate" the results of their balloting; how a tie vote must be resolved; what schedule the balloting should follow; and on and on.

Above all, the Electoral College had nothing to do with slavery. Some historians have branded the Electoral College this way because each state's electoral votes are based on that "whole Number of Senators and Representatives" from each State, and in 1787 the number of those representatives was calculated on the basis of the infamous three-fifths clause. But the Electoral College merely reflected the numbers, not any bias about slavery (and in any case, the three-fifths clause was not quite as proslavery a compromise as it seems, since Southern slaveholders wanted their slaves counted as five-fifths for determining representation in Congress, and had to settle for a whittled-down fraction). As much as the abolitionists before the Civil War liked to talk about the "proslavery Constitution," this was more of a rhetorical posture than a serious

historical argument. And the simple fact remains, from the record of the Constitutional Convention's proceedings (James Madison's famous *Notes*), that the discussions of the Electoral College and the method of electing a president never occur in the context of any of the convention's two climactic debates over slavery.

If anything, it was the Electoral College that made it possible to end slavery, since Abraham Lincoln earned only 39 percent of the popular vote in the election of 1860, but won a crushing victory in the Electoral College. This, in large measure, was why Southern slaveholders stampeded to secession in 1860-61. They could do the numbers as well as anyone, and realized that the Electoral College would only produce more anti-slavery Northern presidents.

Yet, even on those terms, it is hard for Americans to escape the uncomfortable sense that, by inserting an extra layer of "electors" between the people and the president, the Electoral College is something less than democratic. But even if we are a democratic nation, that is not all we are. The Constitution also makes us a federal union, and the Electoral College is pre-eminently both the symbol and a practical implementation of that federalism.

The states of the union existed before the Constitution, and in a practical sense, existed long before the revolution. Nothing guaranteed that, in 1776, the states would all act together, and nothing that guaranteed that after the Revolution they might not go their separate and quarrelsome ways, much like the German states of the 18th century or the South American republics in the 19th century. The genius of the Constitutional Convention was its ability to entice the American states into a "more perfect union." But it was still a union of states, and we probably wouldn't have had a constitution or a country at all unless the route we took was federalism.

The Electoral College was an integral part of that federal plan. It made a place for the states as well as the people in electing the president by giving them a say at different points in a federal process and preventing big-city populations from dominating the election of a president.

Abolishing the Electoral College now might satisfy an irritated yearning for direct democracy, but it would also mean dis-

mantling federalism. After that, there would be no sense in having a Senate (which, after all, represents the interests of the states), and further along, no sense even in having states, except as administrative departments of the central government. Those who wish to abolish the Electoral College ought to go the distance, and do away with the entire federal system and perhaps even retire the Constitution, since the federalism it was designed to embody would have disappeared.

None of that, ironically, is liable to produce a more democratic election system. There are plenty of democracies, like Great Britain, where no one ever votes directly for a head of the government. But more important, the Electoral College actually keeps presidential elections from going undemocratically awry because it makes unlikely the possibility that third-party candidates will garner enough votes to make it onto the electoral scoreboard.

Without the Electoral College, there would be no effective brake on the number of "viable" presidential candidates. Abolish it, and it would not be difficult to imagine a scenario where, in a field of a dozen micro-candidates, the "winner" only needs 10 percent of the vote, and represents less than 5 percent of the electorate. And presidents elected with smaller and smaller pluralities will only aggravate the sense that an elected president is governing without a real electoral mandate.

The Electoral College has been a major, even if poorly comprehended, mechanism for stability in a democracy, something which democracies are sometimes too flighty to appreciate. It may appear inefficient. But the Founders were not interested in efficiency; they were interested in securing "the blessings of liberty." The Electoral College is, in the end, not a bad device for securing that.

I.13.

Electoral College Alternatives: Tradeoffs

Benjamin J. Kassow

Forty-eight states use a popular vote method to allocate electoral votes (two states, Nebraska and Maine, use a partially congressional-district based allocation for the electoral votes in those states). One of the key controversies regarding the Electoral College has been the degree to which the Electoral College is perceived by some to be "anti-democratic" in that people argue that the Electoral College does not reflect the "will of the people." To me, as is often the case, the key thought is thinking about the Electoral College as it currently exists and other possible electoral systems for the presidency in terms of a series of tradeoffs.

What might these tradeoffs look like? First, do we want a system that directly reflects the will of the largest plurality of Americans, the majority (50+%) of voting Americans, or one that reflects some level of dispersion and geographic viability throughout a variety of regions in the country? Secondly, depending on what we prioritize as a country, what system might we want that would reflect these priorities? Thirdly, do most Americans want the Electoral College to change? Finally, if many Americans want to reform the Electoral College, what tradeoffs would we want to make to ensure that people feel that their vote counts?

One first question is how the Electoral College could be changed, from a logistical perspective. On first glance, eliminating (or strongly modifying) the Electoral College looks daunting. At a most basic level, the Constitution must be amended, which, of course, is exceedingly difficult. While other approaches are possible to use (changing electoral laws in the states, for instance, which decide how to allocate Electoral College votes), questions remain

as to what might be the most feasible method to do so. Still, many attempts to change the Electoral College certainly exist in American history, although only one has really been fundamental in terms of changing the Electoral College allocation proposal in a serious way: the Bayh-Celler (H.R. J. Res. 681) amendment (1969) proposal. The intractability of eliminating or massively changing the Electoral College is reflected in the relatively few major attempts at the federal level since the Civil War. Additionally, there are still substantial questions as to what tradeoffs we might want to have as a country, assuming a different approach from what we have now.

The second approach: changing state legislation as to how states distribute their Electoral College votes. While this is more practical, it also raises other potential issues of inequity among states, and how much your vote may count for president being in one state versus another. Unless somehow all states could change concurrently, simply changing a state or two would likely result in other problems, including substantial differences in how states award electors. This could lead to the potential for large inequities among states as to how people's votes actually count in presidential elections. From a Constitutional standpoint, specifically with regards to the Equal Protection Clause, this may prove problematic (see *Bush v Gore*, 531 U.S. 98, [2000]), and may lead to other concerns about how individual's votes are counted (i.e., if it varies dramatically among states).

Even if a majority of United States citizens approves reforming the Electoral College, another question of practicality also rears its head. If we open the Electoral College "Pandora's box," then what problems might we have with any other potential solution? Certainly, if we were to have a national popular vote, there would be strong criticisms by many that the will of states would be taken away. Similarly, if we were to adopt a different system, would that help to solve the problems that those who criticize the Electoral College level at the College? While it might, depending on the solution chosen, a host of other questions would also arise.

So, what could potentially be an alternative to the Electoral College, as it currently stands? President Nixon himself, in 1969,

proposed replacing the Electoral College with a national popular-vote based system that would simply award the presidential candidate with the highest percentage of the popular vote the presidency. One tool in this proposal would have prevented a candidate with a very small percentage of the popular vote from leading, which would be a mandatory runoff election between the top-two candidates if no candidate exceeded 40% of the popular vote. But what tradeoff would a system like this have? The fate of the Bayh-Celler amendment, although it is only one case, is perhaps quite instructive as to the various tradeoffs involved with altering how the Electoral College functions, at the federal level. While the amendment passed with bipartisan support through the House of Representatives, it was successfully filibustered in the Senate, because it would damage the ability of smaller states to influence the outcome of United States presidential elections in the future. So, as I have already mentioned, the constant tradeoff is in terms of how to distribute voting power to choose the president: should it be distributed to individuals as one person in the entire United States, or distributed to individuals as part of an individual state *within* the United States?

In closing, thinking about the Electoral College, regardless of whether we may be in favor of it, opposed to it, or decidedly neutral, requires us to consider a series of tradeoffs. Do we want a political system that encourages political candidates to have majorities of geographic regions within the United States, or one that encourage presidential candidates to win the most votes more generally? Which system better reflects the will of the people? In any case, when thinking about whether we approve of the Electoral College as is or whether/how we may wish to alter it, it is crucial to examine any tradeoffs we might be making if we were to change it.

Section Four
Teaching the Electoral College

I.14.

"Empathy for the Unicorn": Teaching About the Electoral College

Brad Austin

I approach the topic of "teaching the electoral college" from two different, if related, perspectives.[1] The first is that of an historian trained in modern American history, someone who teaches about the disputed elections of 1876 and 2000 and who notes how a few thousand votes in specific states would have denied John F. Kennedy the presidency in 1960 and given the nation President Nixon ahead of schedule. Like most teachers, I address the basic "rules of the game" of the Electoral College and explain how a candidate can attract more popular support than his (and now, her) opposition but still lose the election. Other essays in this volume offer teachers and other interested citizens the historical contexts they need to teach the mechanics and specific consequences of the Electoral College and those elections.

My second perspective is that of someone who trains future high and middle school history teachers and who spends most of my "methods of teaching history" course encouraging my students to make their own classes about more than the mere memorization of names, dates, treaties, and battles. As someone who emphasizes the importance of teaching historical thinking skills (close reading of sources, chronological thinking, determining causation, identi-

[1] Oddly enough, I discussed the relationship between North Dakota and the Electoral College with my Massachusetts university students during a wide-ranging conversation on the day after the election. If I recall correctly, my remark was something along the lines of "One of the consequences of the electoral college is that individual North Dakota voters have a lot more power than we do in presidential elections."

fying perspectives, etc.), I embrace the opportunities that studying the Electoral College provides to teachers who want to challenge their students' assumptions and to give them materials and questions that push them to formulate arguments and to think for themselves.

Sam Wineburg, in his path-breaking *Historical Thinking and Other Unnatural Acts*, recounts the story of Marco Polo and the world's ugliest unicorns.[2] As Wineburg explains, during his travels, Polo came across an animal with a head "like a wild Boar" and a short, stubby horn. Obviously, it was a unicorn. Polo concluded that this animal was "a passing ugly beast to look upon, and is not in the least like that which our stories tell of as being caught in the lap of a virgin; in fact, 'tis altogether different from what we fancied."[3] Modern readers, of course, recognize that Polo was describing a rhinoceros, not a unicorn, even if they might concede that virgins (and non-virgins alike) might be wise to avoid having one sit on their laps.

I include this story not because I find it intrinsically interesting (although I do), but because I second Wineburg's call for history instructors to use their lessons and their classes to enhance their students' capacities for empathy, for understanding how others perceive and experience the world. This story demonstrates how even very worldly, learned people are often inclined to consider new information and evidence within the confines of existing belief systems and paradigms for understanding the world. Put differently, we are too often blinded by what we "know" to recognize what we see.

After the 2016 presidential election results proved pundits to be spectacularly wrong, many commentators pointed to Americans' increasing inclination to avoid exposure to conflicting ideas and evidence as a reason for the surprise many felt when the out-

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[2] Sam Wineburg, *Historical Thinking and Other Unnatural Acts: Charting the Future of Teaching the Past* (Temple University Press, 2011), 24.

[3] Marco Polo, *The Travels of Marco Polo: The Complete Yule-Cordier Edition* (Dover Publications, 1993), 285.

come became clear. The causes of our current inability to agree on basic facts or the authority of experts will probably spawn a thousand dissertations and keep political scientists and sociologists employed for a generation, but it is not the focus of this essay. Our current situation, in fact, reminds us of the obligation history teachers have to prepare students for the demands of civic life, and teaching the Electoral College offers multiple opportunities for us to fulfill that obligation.

Teaching about the history of the Electoral College, and the ideologies and assumptions that led to its creation, allows instructors to challenge their students to see something new (a rhino) instead of seeing just another unicorn, if an ugly one. If our students are going to develop the ability to understand and appreciate different perspectives and viewpoints, then studying history is a great place to practice that skill. Specifically, it is vital that our students realize that "they" (the founding generation) did not think like "us." Heck, "they" didn't even think like each other, a fact that explains the emergence of Federalist and Anti-Federalist camps before the ratification of the Constitution and the almost immediate evolution of political factions into parties after the new government was formed. These divisions and disagreements present us with an abundance of opportunities for our students to explore how particular experiences (the Revolution, opposition to George III, Articles of Confederation, etc.), regional perspectives (coastal, in-land, North, South, small state, large state, etc.), economic situation (merchant, farmer, plantation owner, tradesman, enslaved person, etc.) led to different conclusions about the desirability of the new government and, especially, its purposefully convoluted and anti-democratic way of choosing a chief executive. In short, a close look at the intellectual roots of the Electoral College challenges students to understand how and why our "Founding Fathers" held vastly different opinions about the desirability of this system for selecting a president and to consider the roots of those disagreements.

Teachers looking for specific ways to do this need only to consult the Documents section of this volume to find abundant

primary sources that can help them accomplish their pedagogical goals. For example, if teachers want to illustrate the wide variety of options considered by the delegates to the Constitutional Convention, then they can ask their students to read (and perhaps translate to 21st-century language) James Madison's notes on "Debates Concerning the Method of Selecting the Executive," especially those from June 1st and September 4th. The notes on June 1st illustrate some of the options initially considered (direct election, Congressional choice, Senate choice, etc.), and the September 4th notes document the ways that several leaders argued over the proposed Electoral College plan, with Governeur Morris offering a succinct six-part defense of the plan in response to some pointed criticism. While teachers would be well served to familiarize themselves with the rest of the debate, these two sections alone give students enough to see how personal experiences, others' histories, and political philosophies led delegates to very different conclusions about the Electoral College.

Students will also be interested to see that the text of the Constitution reflects the delegates' desires to cede considerable power to the states and their legislatures. As one can see in Documents section, Article II, Section 1 of the Constitution reads, in part, "Each State shall appoint, in such manner as the Legislature may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." Teachers can ask students to create an imaginative and comprehensive list of different ways those states could have chosen their electors, given only these instructions, and to consider the says these options would have empowered different groups.

Given the popularity of the Broadway musical based on his life, Alexander Hamilton's involvement in the debate might attract the attention of students. While he participated in the convention debates, Hamilton's most important contributions to our understanding of the purpose of the Electoral College are found in his essay, *Federalist* No. 68, available in the Documents section.

Here, Hamilton notes that the Electoral College might be the one part of the Constitution that had not yet sparked great discussion, something he credited to the fact "that if the manner of [selecting the president] be not perfect, it is at least excellent. It unites in an eminent degree all the advantages, the union of which was to be wished for." The next several paragraphs outlines those advantages for readers, and they do so in language that is accessible to students who want to see the best case Hamilton could make for the Electoral College. Teachers might want to know if their 21st century students agree with Hamilton about the value of these elements of the Electoral College.

If they have their students read Hamilton's thoughts, then teachers might also want to introduce their students to *Antifederalist* No. 72, in which Republicus questions the wisdom of using an Electoral College to choose an executive. In this essay (also available in the Documents section), the author offers an extended critique of this method:

> "I go now to Art. 2, Sec. 1, which vest the supreme continental executive power in a president -- in order to the choice of whom, the legislative body of each state is empowered to point out to their constituents some mode of choice, or (to save trouble) may choose themselves, a certain number of electors, who shall meet in their respective states, and vote by ballot, for two persons, one of whom, at least, shall not be an inhabitant of the same state with themselves. Or in other words, they shall vote for two, one or both of whom they know nothing of…
>
> Is it then become necessary, that a free people should first resign their right of suffrage into other hands besides their own, and then, secondly, that they to whom they resign it should be compelled to choose men, whose persons, characters, manners, or principles they know nothing of? And, after all (excepting some such change as is not likely to happen twice in the same century) to intrust Congress with the final decision at last? Is it

> necessary, is it rational, that the sacred rights of mankind should thus dwindle down to Electors of electors, and those again electors of other electors? This seems to be degrading them even below the prophetical curse denounced by the good old patriarch, on the offspring of his degenerate son: 'servant of servants'."

Given that there was clearly a public debate over the Constitution and its many provisions, teachers can seize the opportunity to put their students in the shoes of the partisans. In this case, in order to have their students understand some of the most important arguments for and against the Electoral College, teachers could have students use Madison's notes, Hamilton's *Federalist* No. 68, and the Anti-Federalist essay as their main sources for a classroom debate, with students being free to offer their own suggestions for choosing a president as well. This exercise would allow, but not require, students to research the biographies of the central figures and, among the more creative and theatrical students, it could lead to *Hamilton*-style "cabinet meeting" rap battles that draw on specific primary sources and present historically accurate arguments.

I'd like to conclude with a final note about how we can profitably talk about assumptions and the Electoral College in the classroom. It is worth noting (or leading our students to the realization), that however much they disagreed about the mechanics and desirability of the Electoral College, the participants in this debate shared some common assumptions about who should have the right to vote and to participate in the political process. As other essays in this volume point out, one of the purposes of the Electoral College was to protect the rights of slaveholders by giving them disproportionate political power, thanks in part to the Three-Fifths clause elsewhere in the Constitution. Students should note that almost no one in the late eighteenth century publically advocated for women's political rights and that Massachusetts's new constitution stripped voting rights from citizens who did not meet the new, higher property-owning threshold for voting. Moreover, in the early 1800s, New Jersey stripped women of the right to vote in that state, and several other states passed new laws denying African

Americans the right to the franchise that they previously enjoyed. Essentially, "the people" in the new republic had a different connotation than it does today. When we ask our students to think about why the Founders designed such a complicated, undemocratic system as the Electoral College, it is useful to broaden the discussion to include *all* of the assumptions they made about the trustworthiness of the American electorate and who should properly have their views represented in the new government.

Part II

New Perspectives on the Electoral College

Prelude

The Context in which the Revised and Expanded Edition was Assembled

Eric Burin

The United States was amid unchartered waters when the Revised and Expanded Edition of *Picking the President* was assembled. Following the unprecedented violent interference with the peaceful transfer of presidential power on January 6, 2021, the United States' presidential election system was the subject of new legislation, path-breaking litigation, and novel jurisprudence. At no point was Donald Trump held criminally or civilly liable for his exploits to overturn his defeat in the 2020 presidential election. Instead, he emerged, for the third consecutive time, as the Republican nominee for president. That is where matters stood during the summer of 2024, when the contributors wrote the following works (some of which were slightly revised soon after the November 2024 general election).

In the Introduction, **Eric Burin** reflects on the past, present, and future of the Electoral College.

Section One features essays which illuminate the creation, ratification, and evolution of the United States' presidential election system. **John P. Kaminski** surveys how the issue went from being "continually rehashed" at the Constitutional Convention, to generating "relatively little sustained discussion" during the ratification contest in 1787-88, and finally to becoming the subject of Amendment XII of the U.S. Constitution in 1804. **Michael H. Taylor** spotlights a central figure in that story, James Wilson, who at the Constitutional Convention was the first to propose a popular vote to elect the president and (one day later) was the first to propose an elector system for that purpose. **Jane E. Calvert**

showcases another delegate who influenced the formation of the presidential election system, John Dickinson, the prolific "Penman of the Founding" who "may have hoped for a time when electors would be unnecessary." **Rosemarie Zagarri** casts the system which the delegates devised as a reflection of "the fundamental tension Americans faced at the time…; that is, the tension between the people as the basis of representative government and the states as the basis of union." **Wilfred U. Codrington III** shifts the attention to contingent elections (i.e., instances in which the electoral vote is inconclusive), observing that the provisions for them are "tragically minoritarian." **Mark Stephen Jendrysik** examines Thomas Jefferson's skeptical response to the Constitution's presidential election system, a disfavor which partly stemmed from his fear that it would be susceptible to foreign interference. **Michael T. Rogers** assesses additional criticisms which were leveled against the system during the ratification contest. **Kathleen Bartoloni-Tuazon** platforms the person who from the beginning literally and figuratively towered over the entire issue, George Washington. Finally, **Heather Cox Richardson** provides a wide-ranging history of the nation's presidential election system from its creation to the eve of the 2024 contest.

Section Two features essays which illuminate modern efforts to reform or abolish the United States' presidential election system. **Gary Bugh** reviews the 1960s' and 1970s' congressional debates on the subject with an eye toward discerning how U.S. lawmakers conceptualized representation. **Robert M. Alexander** focuses on the Electoral Count Reform Act of 2022, which was enacted "to prevent another January 6th." **Jack N. Rakove** makes four "big points" about the presidential election system, the last one being that to change it, individuals must "grasp" that no one votes based on "the size (meaning populace) of their state," but rather that the "real interests" which "determine our votes are scattered across *all* states." **George C. Edwards III** elaborates on this theme, explaining that "states do not embody coherent, unified interests" and that the way the system currently operates, presidential candidates "ignore most small states; in fact, they ignore

most of the country." **Randall M. Miller** posits that "reformers" and "the people" can constructively live "within" the extant presidential election system by championing the adoption of democracy-enhancing measures which in time may foster "popular support to scrap" the current system altogether. **Paul Schumaker** carries this notion forward, holding up for consideration two prospective constitutional amendments: one to amend the Constitution's amendment process and the other to institute a presidential election system which would use approval voting for a preliminary election and ranked-choice voting for the general election. Combined, the Introduction, Section One, and Section Two provide an expansive view of the United States' presidential election system from its inception onward.

On October 16, 2024, Trump called those who attacked the U.S. Capitol on January 6, 2021, "patriots." He also used the word "we" when describing the events of that day, which he characterized as a "day of love." Three weeks later, Election Day arrived, and by the following day, the results showed Trump winning the 2024 presidential contest, defeating Democrat Kamala Harris. He appeared to have secured a majority of electoral votes and, as time would reveal, a plurality of popular votes.[1]

On December 17, 2024, each state's presidential electors voted as expected; on January 6, 2025, Congress certified their votes; and on January 20, 2025, Donald Trump was inaugurated president. Each act took the United States still further into the unknown.[2]

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[1] Ryan J. Reilly, "Trump once called Jan. 6 a 'heinous attack.' Now he calls it a 'day of love,'" *NBC News*, October 17, 2024, https://www.nbcnews.com/politics/donald-trump/trump-called-jan-6-henious-attack-now-calls-day-love-rcna175942; Louis Jacobson, "The size of Donald Trump's 2024 election victory, explained in 5 charts," *PBS*, November 24, 2024, https://www.pbs.org/newshour/politics/the-size-of-donald-trumps-2024-election-victory-explained-in-5-charts.

[2] James M. Lindsay, "The 2024 Election by the Numbers," *Council on Foreign Relations*, December 18, 2024, https://www.cfr.org/article/2024-election-numbers; Lisa Mascaro, Mary Clare Jalonick, Farnoush Amiri, and Matt Brown, "Congress certifies Trump's 2024 win, without the Jan. 6 mob violence of four years ago," *apnews.com*, January 6, 2025, https://apnews.com/article/jan-6-trump-election-certifica-

Thus, the Revised and Expanded Edition of *Picking the President* went to press with the person at the epicenter of the nation's first non-peaceful transfer of presidential power newly clothed in that power again.

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tion-capitol-b8284b9b6b22f78ab7f23f8c8b3c3da3; Domenico Montanaro, "4 Takeaways from Trump's Second Inaugural Address," NPR.org, January 20, 2025, https://www.npr.org/2025/01/20/g-s1-43759/trump-inaugural-address-key-moments.

Introduction

The Past, Present, and Future of the Electoral College

Eric Burin

In 1823, over thirty-five years after serving as a delegate to the Constitutional Convention of 1787, James Madison reflected on that body's struggle to find "an unexceptional process" for "appointing the Executive" of the United States (i.e., electing the president of the U.S.). The challenge was "deeply felt" by the attendees, recalled Madison. He further recollected that they hammered out the "final arrangement" late in the convention. Madison conceded that what they devised "was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies," adding, "tho' the degree was much less than usually prevails in them." The following account illuminates 1) why the convention created and adopted an elector-based plan for appointing the national executive; 2) that plan's role in the subsequent ratification of the U.S. Constitution; 3) its primary characteristics and key concessions, then and now; and 4) the future prospects of a nationwide popular vote to elect the president.[1]

[1] "From James Madison to George Hay, 23 August 1823," *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/04-03-02-0109. [Original source: *The Papers of James Madison*, Retirement Series, vol. 3, *1 March 1823–24 February 1826*, ed. David B. Mattern, J. C. A. Stagg, Mary Parke Johnson, and Katherine E. Harbury. Charlottesville: University of Virginia Press, 2016, pp. 108–111.].

Finding an Unexceptional Process for Appointing the National Executive

The Declaration of Independence and the Articles of Confederation

In July 1776 at the Second Continental Congress in Philadelphia, delegates representing thirteen colonies and acting "by the Authority of the good People" of them, announced that they were dissolving the "political bands" which connected those colonies to Great Britain. The former, they declared, were "Free," "Independent," and "united" states. Two months later, the new union of states adopted its official name, "The United States of America." The following year, delegates to the same body adopted a governing document for the U.S., the "articles of Confederation and perpetual Union" (commonly called "the Articles").[2]

Under the Articles, governmental power mostly resided with the states. For starters, each state explicitly retained its "sovereignty, freedom[,] and independence." As for the central Confederation government, it was feeble and inflexible. It consisted of a single body, the Confederation Congress, the authority of which to a considerable extent concerned military matters, meaning it lacked several vital powers, such as the ability to raise revenue independently, regulate domestic- and foreign commerce, and generally enforce its will across the United States' vast territorial claims. Within the Confederation Congress, each state delegation had one vote. It was hard to pass crucial laws and harder still to amend the Articles: supermajorities were needed for the former and the concurrence of all state legislatures was required for the latter. In short, the union

[2] Dunlap Broadside [Declaration of Independence]; 7/4/1776; Rough Journals; Papers of the Continental Congress, 1774 - 1789; Records of the Continental and Confederation Congresses and the Constitutional Convention, Record Group 360; National Archives Building, Washington, DC. [Online Version, https://www.docsteach.org/documents/document/dunlap-broadside, December 8, 2024]; Articles of Confederation; 3/1/1781; Miscellaneous Papers of the Continental Congress, 1774 - 1789; Records of the Continental and Confederation Congresses and the Constitutional Convention, Record Group 360; National Archives Building, Washington, DC. [Online Version, https://www.docsteach.org/documents/document/articles-of-confederation, December 8, 2024].

under the Articles was a "firm league of friendship" forged amid a war for political independence.[3]

The Articles were in force when the Americans' successful War for Independence ended in 1783. During the postwar period, the Confederation government was ill-equipped to address problems which strained the country, including an economic downturn, commercial disorder, and domestic uprisings, as well as a depleted U.S. treasury and worrisome foreign affairs. Meanwhile, many states, bowing to popular pressure, passed debtor relief- and paper money laws, which aimed to alleviate pervasive financial hardship but displeased those who thought such measures subverted property rights and thus contravened what they regarded one of the purposes of government. By the mid-1780s, some fretted that the Articles' loosely connected union, which was intended to be "perpetual," might shatter, crack, or crumble.[4]

James Madison's Notes *and the Constitutional Convention*

Appointed by their respective state governments, fifty-five delegates at some point attended the Constitutional Convention. The body did not convene on time: Each participating state was expected to send a slate of delegates. Once two of a state's delegates were seated at the convention, that state would be deemed present. When a quorum of seven states was deemed present, the delegates officially could start their work. As it turned out, the convention did not begin its sessions until May 25, eleven days later than originally planned.[5]

The preeminent account of the convention was penned by Virginia delegate James Madison. Thirty-six years old, Madison had served in multiple bodies, including the Virginia legislature, Second Continental Congress, and Confederation Congress.

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[3] Michael J. Klarman, *The Founders' Coup: The Making of the United States Constitution* (New York: Oxford University Press, 2016), 13-14.

[4] Klarman, *Founders' Coup*, 11-125.

[5] State legislatures chose delegates, except in South Carolina, where the governor did so. Klarman, *Founders' Coup*, 246; "Madison Debates May 14, May 25," https://avalon.law.yale.edu/18th_century/debates_514525.asp.

Along the way, he had developed a practice of keeping a legislative diary, which he used to record others' arguments and provide intelligence to non-attendees. At the Constitutional Convention, Madison took rough notes during each day's debates and then, typically once or twice per week, he would revise those notes into a more coherent form. This lasted until August 21. Thereafter, Madison continued to take rough notes, but he did not begin revising them until the late summer of 1789, by which time the convention had adjourned, the Constitution had been ratified, and the new government it created had been instituted. Madison's full *Notes of Debates in the Federal Convention of 1787* was published in 1840, approximately four years after Madison, "the last Founder," died.[6]

Madison's notes became so important partly because so few were privy to the convention's workings. On May 29, the delegates adopted the rules which would govern their deliberations. Among them was a commitment to secrecy: the convention would be off-limits to others and the attendees would reveal nothing outside its guarded doors. The veil which separated the delegates from the public, so the thinking went, would encourage fulsome and frank discussions.[7]

The following account of the convention primarily relies on portions of Madison's *Notes*. Consequently, its depiction of the event is selective and refracted through a lens which Madison constructed and reconstructed for his own reasons. In other words, the following is *a* history of the convention seen mostly through one multilayered historical document. Others have written different histories of the convention, accounts which utilize additional sources, including notes penned by other delegates at the convention and their recollections after it, as well as records left by countless Americans who expressed their views on the subject. The following account, in other words, offers just a prismatic pinhole view of the convention and the wide world around it.

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[6] Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2015).

[7] May 29, 1787 Constitutional Convention (for items so cited, see Part III: Resources).

Establishing a National Executive

The convention delegates were authorized only to modify the Articles of Confederation.[8] Yet during the gathering's initial days, many attendees signaled their ambitious intentions. On May 30, despite objections from some delegates that the body was traversing beyond its rightful sphere, by a six-to-one margin (with each state delegation casting one vote), the convention agreed that "a National government ought to be established consisting of a supreme Legislative, Executive[,] & Judiciary." (New York's delegation, which had two members present, was divided.) Thereafter, the convention began a summer-long project of devising a new governing document for the nation, an undertaking which included establishing a process for appointing the national executive. They took up the subject the next day and did not finish concocting a fully developed, politically viable plan until the convention's hurried conclusion three-and-half months later.[9]

Opposition to a Popular Vote System

The national executive, which most delegates envisioned as a single-person office, occupied a unique, complex, and contested place amid the attendees' thoughts about democracy. Many delegates deemed the masses inherently unstable and inflammatory. Yet even some who thought so also thought that the executive's authority ought to emanate from "the people." Rooting the executive in the people would distance the office from and fortify it against the other branches of the national government as well as the states. It also would promote nationalism (though the delegates disagreed on the extent to which the U.S. should be consolidated, as did other Americans). Moreover, the popular will could be tempered—for example, by establishing relatively lengthy terms of office, shielding officeholders from recall, instituting multistep indirect elections, and increasing an election's geographic scope to advantage

[8] "Instructions to the Convention Delegates," Center for the Study of the American Constitution. https://csac.history.wisc.edu/document-collections/the-constitutional-convention/convention-delegates/.

[9] May 30, 1787 Constitutional Convention.

persons with suitable renown and commensurate resources. All of which made it appropriate and possible, according to some delegates, to safely ground the executive in the people.[10]

Delegates who opposed instituting a popular vote system made the following arguments:

- Some claimed that common folk would be unfamiliar with individuals beyond their state or region. For example, Virginia delegate George Mason maintained that a popular election would constitute "an act which ought to be performed by those who know the most of Eminent characters and qualifications" being "performed by those who know the least." (The counterargument was that as time passed and the bonds of union strengthened, more figures with continental reputations would emerge as prospective national executives.)
- Others contended that the masses would be misinformed and easily duped by demagogues. Massachusetts delegate Elbridge Gerry, for instance, predicted that "[t]he ignorance of the people would put it in the power of some one set of men dispersed through the Union & acting in Concert to delude them into any appointment." (The counterargument was that nefarious characters never could beguile the entire county's sprawling, heterogeneous populace.)
- Still others argued that a small-state resident never would win an election which was conducted under a popular vote system. Since voters "invariably" would prefer a candidate from their own state, explained Connecticut delegate Oliver Ellsworth, a large-state resident would "invariably" win the contest. (This issue could be addressed by having voters cast multiple ballots and establishing requirements concerning how many had to be for a person who resided in a different state than the voter.)
- Finally, there were those who observed that southern states would be hampered by a popular vote system because, collectively, one-third of their inhabitants were enslaved Black Americans, who were disenfranchised. As Virginia delegate James Madison noted, "[t]he disproportion of qualified voters

[10] June 4, 1787 Constitutional Convention.

> in the N[orthern] & S[outhern] States" would throw "disadvantages…on the latter." (The counterargument, also voiced by Madison, was that, for now, southern states ought to acquiesce for the greater good's sake, and, in the future, they could expect to surpass their northern counterparts in population and possibly effect slavery's end.)

On July 25, the convention voted down by a five-to-six margin a motion to consider a popular vote system in which each voter would have cast multiple ballots. The outcome reflected what by then was a fairly common political alignment insofar as the executive's appointment was concerned: The three southernmost slaveholding states (North Carolina, South Carolina, and Georgia) voted against the motion, as did Massachusetts and New Hampshire. Pennsylvania, Maryland, and Virginia supported the motion, as did Connecticut and New Jersey. Seen this way, the fate of the popular vote proposal rested with Delaware, the smallest state, which often sided with the latter group, but did not do so in this instance, and instead cast the deciding vote against the motion. The narrow defeat arguably marked the closest the U.S. has come to instituting a popular vote to elect the national executive.[11]

Opposition to State Officeholders Appointing the National Executive

Few delegates wanted state officeholders to directly appoint the national executive. As a case in point, a June 9 motion by Gerry to so empower state executives was not backed by a single delegation. Likewise, when on July 24 Gerry proposed that state legislatures appoint the national executive "the *noes* were so predominant…the States were not counted." Why did so many delegates disfavor such state-based modes of appointment?[12]

On July 25, shortly before the convention narrowly voted down the aforementioned popular vote proposal, Madison ex-

[11] For Mason, see July 26, 1787 Constitutional Convention; for Gerry, Ellsworth, Madison, and the defeat of the popular vote proposal, see July 25, 1787 Constitutional Convention.

[12] June 9, 1787 Constitutional Convention; July 24, 1787 Constitutional

plained why, in his view, any system which empowered state officeholders to appoint the national executive was patently suboptimal. He noted that no one had or presumably would suggest that state judiciaries appoint the national executive. State executives, added Madison, were subject to sundry objections, including "this insuperable one, that being standing bodies, they could and would be courted, and intrigued with[,] by the Candidates, by their partizans, and by the Ministers of foreign powers." As for state legislatures, entrusting them with the national executive's appointment would undercut one rationale for establishing the office: to prevent the enactment of "pernicious measures" (i.e., debtor relief- and paper money laws). "One object" of the national legislature, asserted Madison, was to control the propensity of states to pass such measures. One object of a veto-wielding national executive, he continued, was to control the national legislature "so far as it might be infected with a similar propensity." Refer the appointment of the national executive to the state legislatures, cautioned Madison, "and this controuling purpose may be defeated." In fact, because state legislatures would act in concert, the national executive could be "rendered subservient to them." Thus understood, authorizing state officeholders to appoint the national executive, besides enticing domestic cabal and foreign interference, would subvert a reason for replacing the Articles with the prospective Constitution.[13]

Opposition to a Legislative System

A substantial number of delegates wanted the national executive to be appointed by the national legislature (which ultimately would consist of two chambers, the House [wherein seats would be apportioned among the states roughly based on their respective pop-

Convention.

[13] July 25, 1787 Constitutional Convention. See also, Article I, Section 10, Clause 1, of the U.S. Constitution, which provides that "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

ulations] and the Senate [wherein each state would be represented equally]). Under this arrangement, the national legislature's power to choose the national executive would resemble that of most state legislatures vis-à-vis state executives. The convention initially adopted a legislative system on June 2, abandoned it on July 19, and readopted it on July 24. Thereafter, proponents of a legislative system fended off multiple attempts to displace it, doing so even as the system itself exhibited four critical weaknesses.

- First, to many delegates, a legislative system invited domestic cabal, opening the door to intrigue between the executive branch and legislative branch.
- Second, since it was susceptible to domestic cabal, a legislative system also was vulnerable to foreign interference.
- Third, to mitigate the aforementioned "evils" (as South Carolina delegate Pierce Butler called them), most proponents of a legislative system wanted to ban "re-eligibility" (i.e., they favored a provision which would permit a person to serve only one term as the national executive). Some delegates who liked re-eligibility on principle disliked that a legislative system seemed by necessity to disallow it. On five occasions the convention took up what might be called "re-eligibility solutions" (i.e., arrangements which would allow re-eligibility under a legislative system while minimizing or eliminating the opportunity for inter-branch collusion). None won the approval of a majority of state delegations. Consequently, dissatisfaction with this issue lingered over a legislative mode of appointment. (Additionally, those who favored a legislative system and a ban on re-eligibility typically preferred a relatively long term of office, such as seven years, which itself was a complex source of dispute.)
- Fourth, the delegates hardly addressed the issue of, much less approved provisions for, "eventual" elections (i.e., the second- or contingent election which would be triggered when the initial- or "immediate" election proved inconclusive). On August 24, while working on the legislative system then in place, the convention agreed, if barely and after some pointed

> debate, that the national legislature's two chambers would vote jointly and each member individually (the most nationalistic arrangement for a legislative system). The delegates also established a threshold for victory, deciding that "a majority of votes of the members present" would be required to win the contest. This was the furthest the convention got in building out a legislative system: the body never answered the question of what would happen if no person was favored by a majority of the national lawmakers and it is not certain a sufficiently acceptable answer could have been devised.

Thus, at the Constitutional Convention, the idea of a legislative mode of appointment never became a fully developed, politically viable plan.[14]

With a legislative system still a divisive work-in-progress and the convention nearing its conclusion, on August 31, the delegates assigned the process for appointing the national executive (an office they had styled, "The President of the United States of America") and other unresolved matters to an eleven-member Committee on Postponed Parts.

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[14] June 2, 1787 Constitutional Convention; July 19, 1787 Constitutional Convention; July 24, 1787 Constitutional Convention; July 25, 1787 Constitutional Convention (including Butler quotation); and August 24, 1787 Constitutional Convention. The five "re-eligibility solutions" were as follows: Virginia delegate James McClurg's July 17 motion to permit the national executive to serve "during good behavior" (i.e., for all intents and purposes, a lifetime appointment); suggestions by Maryland delegate Luther Martin and others on July 24 to institute an exceptionally long term of office for the national executive; Pennsylvania delegate James Wilson's idea (which he disliked but nevertheless floated on July 24) that the national executive be appointed by "a small number" (fewer than fifteen) of national legislators who would be drawn by lot and who would "retire immediately" to make their selection; Ellsworth's July 25 motion which provided that whenever a sitting executive sought another term, the contest would rest with electors who had been appointed by their respective state legislatures; and South Carolina delegate Charles Pinckney's July 25 proposal to require a sitting executive to leave office for at least one term and then allow that person to return to it.

Instituting an Elector Plan

In 1802, fifteen years after the convention, Delaware delegate John Dickinson, who had been a member of the Committee on Postponed Parts, recalled how that body had resolved the summer-long debate over the executive's appointment. Dickinson gave himself a dramatic and starring role in the affair. Having been indisposed for much of the convention, explained Dickinson, he had returned as the Committee on Postponed Parts was finishing its work. "[I]f I remember rightly," reflected the sixty-nine-year-old Dickinson, the committee intended to recommend that "the Legislature" pick the president ("The particulars I forget," he added). Dickinson recalled urging his counterparts to reconsider the matter: given the extensive powers which the Constitution would confer on the office, the people would object "unless they themselves would be more immediately concerned" with the president's election. If the convention erred on this issue "the whole [Constitution] would be lost." According to Dickinson, Pennsylvania delegate Gouverneur Morris "immediately" asked his fellow committee members to discuss the subject further. They did so, recollected Dickinson, whereupon Madison "took a Pen and Paper, and sketched out a Mode for Electing the President." Its core component was a two-step process in which an appointing agent would appoint electors, who, in turn, would elect the president.[15]

From the start, proponents of a popular vote system had regarded an elector system as the next closest thing. For example, on June 1, Pennsylvania delegate James Wilson championed a popular vote system, and the next day he presented an elector system which featured popularly elected electors. The convention voted down Wilson's elector proposal (only Pennsylvania and Maryland supported it). Even so, later, on July 19, the convention adopted an elector system in which state legislatures would appoint electors. By the end of the day, it had approved a six-year term of office for

[15] John Dickinson to George Logan, January 16, 1802, in James H. Hutson, ed., *Supplement to Max Farrand's The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1987), 300-02. https://consource.org/document/john-dickinson-to-george-logan-1802-1-16/20130122082703/.

the national executive and allowed for re-eligibility. Over the next two days, the convention built out that elector system, adopting a formula for apportioning electors among the states, eligibility requirements which safeguarded electors' integrity, and a measure which provided that electors would be compensated for their service by the national government. On July 24, however, the convention readopted a legislative mode of appointment (the reversal largely stemmed from Delaware and New Jersey flipping their votes). Still, support for an elector system remained, as evidenced by the report of the Committee on Postponed Parts.[16]

To win supporters, the report's plan for appointing the national executive offered something to most everyone.

- The president would be elected by electors, who themselves would be chosen for that one duty. The people would not directly pick the president, which appeased opponents of a popular vote system.
- Each state would be apportioned a sum of electors equal to its representation in the national legislature. Numerically, electors would replicate a joint session of the Senate and the House. The inclusion of the Senate in the formula for apportioning electors among the states advantaged small states. The inclusion of the House in the formula advantaged slaveholding states, a benefit derived from the Constitution's Three-Fifths Clause, which allowed states to count three-fifths of their enslaved inhabitants when determining their haul of House seats. Thus, in the apportionment of electors, large, free states would be underrepresented while small states and slaveholding states would be overrepresented.
- After the committee presented its report, the convention reintroduced, slightly modified, unanimously passed, and further refined a provision which it had approved while working on an elector system in July, establishing that an elector could not

[16] June 1, 1787 Constitutional Convention; June 2, 1787 Constitutional Convention; July 19, 1787 Constitutional Convention; July 20, 1787 Constitutional Convention; July 21, 1787 Constitutional Convention; July 24, 1787 Constitutional Convention.

be a "Senator or Representative" or hold "an Office of Trust or Profit under the United States." This provision aimed to prevent cabal and corruption.

- The report's plan included safeguards against state subversion. For example, it empowered the national legislature to determine when electors would be chosen and assemble ("and…give their votes," the convention later specified). By these means, the national government would exercise some control over the elector system's operation. (The report's plan did not authorize the national government to compensate electors, however, nor did the convention later add such a provision.)
- Electors would be appointed in a manner directed by their respective state legislatures. Some delegates wanted electors to be popularly elected; others wanted state lawmakers to select electors (among them were delegates whose first choice was a legislative mode of appointment). This provision was the politically optimal compromise, for it *required neither* state lawmakers nor the people to choose electors but *permitted both* to do so.
- Each state's electors would meet and vote in their respective states (the convention later mandated that "the election shall be on the same day throughout the United States"). These provisions sought to stymie unvirtuous collusion.
- Electors would cast two ballots for president, one of which had to be for a resident of another state. This provision served three purposes: it increased the likelihood that a small-state resident would be elected president; it fostered nationalism; and it abetted majoritarianism (if electors cast one ballot, so the reasoning went, presidential contests likely would end with a large-state resident finishing first with a plurality of electoral votes, whereas if electors cast two ballots, it would increase the chances that one or more persons would receive votes from at least half of the electors).
- The report's plan stipulated that after the electors voted, they would tabulate the results, then sign and certify them, and finally transmit them sealed to the nation's capital. Once they did so, the electors' service would end. The scattered and

temporary nature of their work proved immensely important, even decisive, for in an age before practically instantaneous long-distance communication, it afforded protections against domestic cabal and foreign interference which no other mode of appointment could match, a popular vote notwithstanding.

- At the nation's capital, the electoral results would be counted, not in the Senate (as the report had provided), but "in the presence" of both chambers of the national legislature—the change perhaps was anti-cabalistic in intent and fitting in nature, given that the apportionment of electors among the states mirrored a joint session of the Senate and the House.
- The person who received the most electoral votes would become president *if* a majority of electors had cast a ballot for that person. This provision raised the questions of what would happen if no person crossed that majority threshold or if there was a tie among those who did cross it. The report's plan provided that when the initial election proved inconclusive, the subsequent contingent election would occur in the Senate. The convention, after extensive debate, instead established that under such circumstances 1) the House "immediately" would choose the president from among the top-five electoral vote-getters; 2) each state delegation would cast one vote, and 3) "a concurrence of a majority of all the States" would be necessary to win the contest. The majority threshold for the initial election, along with the provisions for contingent elections, further increased the chances that a small-state resident would become president.
- One of the last provisions the convention added to the plan concerned whether presidential elections would occur only at "fixed periods." The Committee on Postponed Parts essentially created the vice presidency from scratch and made it second-in-line to the presidency. The convention later provided that the national legislature could enact legislation concerning succession therewith and that a person who became and remained president under such legislation would serve "until…a Presi-

dent shall be elected" (a phrase that, to Madison, suggested the possibility of "an intermediate election of the President").
- The report's plan set the president's term of office at four years, which was shorter than the six-year term approved by the convention when it was constructing an elector system in July but longer than the one-year terms served by most state executives.
- The plan allowed for re-eligibility: there would be no limit on the number of terms a person could serve as president.

Given the political realities at the convention, the report's plan, reflected Georgia delegate Abraham Baldwin (who had served on the Committee of Postponed Parts), was "not so objectionable when well considered, as at first view."[17]

Indeed, although the convention changed the report's arrangement for contingent elections, modified other provisions, and wrangled over small but important details which the report had not addressed, the report's plan for the executive's appointment otherwise bowled over the opposition. And that which abetted its approval at the Constitutional Convention did likewise at subsequent state ratifying conventions.[18]

The Role of the National Executive's Appointment in the Ratification of the U.S. Constitution

The convention wrote the rules for ratifying the Constitution. It first would be sent to the Confederation Congress, as would an explanatory letter from the convention's president, Virginia delegate George Washington. The Confederation Congress did not need to approve the Constitution; it simply would forward the document to the states. State legislatures did not need to approve the Constitution either; they merely would summon ratifying conventions which would accept or reject it, the delegates to those conventions being popularly elected. Once nine of the thirteen states had rati-

[17] September 4, 1787 Constitutional Convention (including Baldwin); September 5, 1787 Constitutional Convention; September 6, 1787 Constitutional Convention; September 7, 1787 Constitutional Convention.
[18] September 5, 1787 Constitutional Convention; September 6, 1787 Constitutional Convention.

fied the Constitution in this manner, it would be the supreme law of the United States (though not binding on states which had not yet ratified it). In disregarding the Articles' amendment procedures and minimally involving the Confederation Congress and state legislatures, the ratification process was "irregular." It also was novel, nationwide in scope, and, by the standards of the time, democratic.[19]

Ratification was not guaranteed. For all parties, the bottom line was that under the Articles, power largely resided with the states, while under the Constitution, power would shift to the national government. Consequently, people from all walks of life, from dirt farmers to state officeholders, had reason to oppose it.

During the ratification contest, the Constitution's plan for appointing the national executive was deprecated. Some decried the position's four-year term of office. Even more warned that permitting re-eligibility all but guaranteed the emergence of an elective monarch. (Once clothed in presidential power, so the argument went, a person likely would not forsake it. One so positioned might manipulate the election system or do away with it under some professed pretext. The demise of the republic would follow.) Others disparaged the plan's provisions concerning electors and contingent elections. Yet every criticism redounded against one question: could those who leveled them devise a superior plan?[20]

In the end, a superior plan proved elusive. Detractors failed to construct something better partly because all they had to work with were the discarded modes from the convention: a legislative system (which never was a fully developed, politically viable plan); empowering state officeholders to directly appoint the president (a concept which at no point came close to garnering the support of

[19] Article VII of the U.S. Constitution (see Part III: Resources).

[20] See, for example, "From Thomas Jefferson to John Adams, 13 November 1787," *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/01-12-02-0342. [Original source: *The Papers of Thomas Jefferson*, vol. 12, 7 *August 1787–31 March 1788*, ed. Julian P. Boyd. Princeton: Princeton University Press, 1955, pp. 349–351.]; and "The Debate Over the President and the Executive Branch," Center for the Study of the American Constitution. https://csac.history.wisc.edu/document-collections/constitutional-debates/executive-branch/.

a majority of delegations), and a popular vote system (one version of which nearly passed one time [the other two times, it secured one vote and two votes, respectively]).[21] As Madison remarked at Virginia's ratifying convention:

> It is observable, that none of the Honorable Members objecting to this [plan], have pointed out the right mode of election. It was found difficult in the Convention, and will be found so by any Gentleman who will take the liberty of delineating a mode of electing the President, that would exclude those inconveniences which they apprehend.[22]

It is also worth noting that when state ratifying conventions approved the Constitution and proposed amendments to it, few of the recommendations concerned the executive's appointment and none presented another plan. The least that can be said is that Constitution's provisions on the subject did not sink its prospects for ratification. And once it was ratified, "the people of the United States" had an unprecedented—and untested—process for appointing their national executive.[23]

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[21] July 25, 1787 Constitutional Convention; July 17, 1787 Constitutional Convention; August 24, 1787 Constitutional Convention.

[22] "Method of Electing the President, [18 June] 1788," *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/01-11-02-0096. [Original source: *The Papers of James Madison*, vol. 11, 7 *March 1788–1 March 1789*, ed. Robert A. Rutland and Charles F. Hobson. Charlottesville: University Press of Virginia, 1977, pp. 153–155.].

[23] Amendments Proposed by State Ratifying Conventions (see Part III: Resources).

The National Executive's Appointment, Then and Now

The Constitution's plan for the national executive's appointment initially had three primary characteristics.

- It promoted democracy. It was the closest thing to a popular vote system politically possible, for it included the potential for the people's participation in presidential elections (and safely so, some delegates would add).
- It promoted nationalism. Nationalism was fostered to the extent that the president was rooted in the people. Moreover, the plan was explicitly interstate in design. Finally, safeguards protected it from state subversion.
- It promoted national security. Whatever delegates thought about the plan's democratic and nationalistic attributes, virtually all acknowledged that, compared to having national legislators or state officeholders pick the president, it provided unmatched defenses against domestic cabal and foreign interference, which many if not all regarded as vital to the republic's survival. The primacy of shielding the executive's appointment from enemies may have been the one thing upon which the delegates agreed.

To garner supporters, the plan included three key concessions.

- It advantaged small states. All understood that the plan overrepresented small states in the apportionment of electors, but many thought that the premier lures were the provisions which increased the likelihood that a small-state resident would be elected president.
- It advantaged slaveholding states. The three southernmost slaveholding states constituted the core opposition to an elector system. In the end, North Carolina and South Carolina voted against the plan. Even so, they and other slaveholding states would benefit from it (indeed, many delegates from slaveholding states favored the plan, including Madison). Of

the advantages accorded small states and slaveholding states, the latter had a greater influence on the nation's trajectory.
- It satisfied delegates who wanted state legislatures to direct electors' manner of appointment (again, among this number were delegates whose first choice was a legislative system).

Thus conceived and constructed, the plan was approved by the Constitutional Convention and subsequent state ratifying conventions.

The plan's original and current characteristics are at odds. Currently, the plan:

- Does not promote democracy. It violates one of democracy's essential features (political equality) and can violate another essential feature (majority rule).
- Does not promote nationalism. It effectively renders Americans in non-competitive states spectators, and it inhibits the formation of interstate affinities.
- Does not promote national security. It is, in fact, a vital security risk: instead of having to influence many voters across the entire U.S., foes may target relatively few voters in competitive states alone.

Regarding its original concessions, the plan:

- Still advantages small states, principally through the inclusion of the Senate in the formula for apportioning electors, whereas the size of the state from which a would-be president hails is of comparatively little-to-no importance.
- No longer advantages slaveholding states, slavery itself having been abolished ("except as punishment for a crime") upon the Thirteenth Amendment's ratification in December 1865.
- Continues to accord state legislatures the power to direct the manner in which their respective electors are appointed.

Such are the remains of the plan's original concessions.

The Prospects of a Nationwide Popular Vote to Elect the President

The National Popular Vote Interstate Compact

Since the 1940s, when the modern polling on the subject began, a majority of Americans (upwards of eighty percent of them at times) have indicated that they favor a popular vote system to elect the president.[24] What are the prospects of a nationwide popular vote for that purpose? The question merits a fulsome answer. But, for now, three observations may warrant brief consideration.

- First, state legislatures' power to direct electors' manner of appointment is the primary instrument for instituting the National Popular Vote Interstate Compact (NPVIC), a binding agreement between states which, if put into operation, effectively would result in a nationwide popular vote.
- Second, since its conception in 2006, the NPVIC has been adopted by eighteen jurisdictions (specifically, seventeen states and the District of Columbia). These eighteen jurisdictions currently control 209 electoral votes (meaning the NPVIC is sixty-one electoral votes short of the 270 required to make it operational).[25]
- Finally, the NPVIC's durability and accomplishments make it uniquely positioned for future success. In September 2024, when I oversaw a national study concerning the United States' presidential election system, the NPVIC was (by a slim margin) the preferred option among a plurality of adult Americans under age fifty (thirty percent favored it) and it drew from Republicans, Democrats, and independents in roughly equal

[24] John R. Koza, Barry Fadem, Mark Grueskin, Michael S. Mandell, Robert Richie, and Joseph S. Zimmerman, *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*, 5th ed. (Los Altos, CA: National Popular Vote Press, 2024), 827-35; Alexander Keyssar, *Why Do We Still Have the Electoral College?* (Cambridge, MA: Harvard University Press, 2020), 383-87.

[25] "Status of National Popular Vote Bill in Each State," National Popular Vote. https://www.nationalpopularvote.com/state-status.

measures.[26] All things considered, its base was comparatively broad, balanced, and young. Thus, the NVPIC movement arguably has brought the nation as close as it has been to a popular vote since the one-vote defeat of a motion to consider one at the Constitutional Convention on July 25, 1787, and it is poised to bring it still closer.

The NPVIC movement may crash upon the shoals of opposition, atrophy, and perish. Or it may secure sixty-one more electoral votes and, assuming it is subject to a legal challenge, the approval of five U.S. Supreme Court justices. In any case, as Madison remarked approximately seven years after recalling the convention's struggle to find "an unexceptional process" for electing the president, "a solid improvement" of what the delegates devised for the national executive "is a desideratum that ought to be welcomed by all enlightened patriots."[27]

The Electoral College in the American Mind

Prior to the 2024 presidential election, I oversaw a study entitled, "The Electoral College in the American Mind."

The study was administered by SurveyUSA from September 13, 2024, to September 17, 2024.

The aggregate results can be found at the following website:

https://doi.org/10.31356/data032

The questionnaire created for and used in the study follows, as does the answer key for Questions 9-15, and Question 28.

[26] Twenty-nine percent of adult Americans under age fifty preferred a constitutional amendment which would ensure that the candidate who receives the most popular votes nationwide wins the presidential election; twenty-seven percent preferred the current system; and thirteen percent indicated that they were "not sure." Eric Burin, Eric Burin, "The Electoral College in the American Mind Dataset, September 13-17, 2024.": https://doi.org/10.31356/data032.

[27] "James Madison to James Hillhouse, 17 May 1830," *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/99-02-02-2045.

The Electoral College in the American Mind

Professor Eric Burin, University of North Dakota
Institutional Review Board Study Information Sheet

Purpose of the Study:

The purpose of this research is to better understand people's thoughts and feelings about the Electoral College.

Procedures to be followed:

You will be asked to complete a web-based questionnaire which includes thirty Electoral College-themed questions.

Risks:

There are no risks in participating in this research beyond those experienced in everyday life.

Benefits:

This research will illuminate Americans' mindset concerning one of the United States' most momentous issues: the process by which it elects its president.

Duration:

It will take about 5-7 minutes to complete the questionnaire.

Statement of Confidentiality:

No identifying information will be collected nor will any report related to this research identify respondents.

All survey responses will be treated confidentially. However, given that the surveys can be completed from any computer (e.g., personal, work, school), we are unable to guarantee the security of the computer on which you choose to enter your responses. As a participant in our study, we want you to be aware that certain "key logging" software programs exist that can be used to track or capture data that you enter and/or websites that you visit.

Right to Ask Questions:

The researcher conducting this study is Dr. Eric Burin of the University of North Dakota. If you later have questions, concerns, or

complaints about the research, please contact Eric Burin at 701-777-4622 during the day.

If you have questions regarding your rights as a research subject, you may contact The University of North Dakota Institutional Review Board at (701) 777-4279 or UND.irb@UND.edu. You may contact the UND IRB with problems, complaints, or concerns about the research. Please contact the UND IRB if you cannot reach research staff, or you wish to talk with someone who is an informed individual who is independent of the research team.

General information about being a research subject can be found on the Institutional Review Board website "Information for Research Participants" http://und.edu/research/resources/human-subjects/research-participants.html.

Compensation:

You will be compensated according to your agreement with your survey provider.

Voluntary Participation:

You do not have to participate in this research. You can stop your participation at any time. You may refuse to participate or choose to discontinue participation at any time without losing any benefits to which you are otherwise entitled.

You do not have to answer any questions you do not want to answer.

You must be 18 years of age older to participate in this research study.

Completion and return of the questionnaire implies that you have read the information in this form and consent to participate in the research.

Please keep this form for your records or future reference.

By clicking "I agree," you agree to participate in this research and confirm that you are 18 years or older.

The Electoral College in the American Mind

Professor Eric Burin, University of North Dakota
Questionnaire
September 13-17, 2024

1. Thinking generally, how much does the person serving as President of the United States affect you personally?
    a. No difference
    b. Small difference
    c. Medium difference
    d. Large difference
    e. Not sure
2. Thinking generally, how much does the person serving as President of the United States affect the mood of the country?
    a. No difference
    b. Small difference
    c. Medium difference
    d. Large difference
    e. Not sure
3. Thinking generally, how much does the person serving as President of the United States affect the standing of the United States in the world?
    a. No difference
    b. Small difference
    c. Medium difference
    d. Large difference
    e. Not sure

4. Thinking about the way the president is elected, which would you prefer?
    a. Keep the Electoral College system and preserve the way it currently operates (that is, a candidate who receives a majority of the electoral votes wins the election, regardless of which candidate receives the most popular votes nationwide).
    b. Keep the Electoral College system but adopt a compact (that is, a binding agreement) between states which, when put into operation, effectively would result in a national popular vote for president (in other words, the compact would ensure that the candidate who receives the most popular votes nationwide wins the election).
    c. Pass a Constitutional amendment which would ensure that the candidate who receives the most popular votes nationwide wins the election.
    d. I'm not sure.
5. How knowledgeable do you believe you are about the Electoral College system?
    a. Highly knowledgeable
    b. Moderately knowledgeable
    c. Slightly knowledgeable
    d. Not at all knowledgeable
6. How knowledgeable do you believe Americans generally are about the Electoral College system?
    a. Highly knowledgeable
    b. Moderately knowledgeable
    c. Slightly knowledgeable
    d. Not at all knowledgeable
7. How interested are you in politics?
    a. Highly interested
    b. Moderately interested
    c. Slightly interested
    d. Not at all interested

8. How important is the United States's national security to you?

    a. Highly important
    b. Moderately important
    c. Slightly important
    d. Not at all important

9. The next seven questions are in the format of a quiz about the Electoral College system.

    (Quiz Question 1) What are the requirements for amending the U.S. Constitution? To become a part of the U.S. Constitution, a prospective amendment must be passed by…

    a. three-fifths of the U.S. House of Representatives; three-fifths of the U.S. Senate; and two-thirds of the states.
    b. two-thirds of the U.S. House of Representatives; two-thirds of the U.S. Senate; and three-fourths of the states.
    c. three-fourths of the U.S. House of Representatives; three-fourths of the U.S. Senate, and four-fifths of the states.
    d. I don't know.

10. (Quiz Question 2) Under the Electoral College, each state gets a certain number of electoral votes. What determines the number of electoral votes each state gets? The number of…

    a. citizens in a state.
    b. voters in a state.
    c. U.S. Senators and U.S. Representatives a state has.
    d. I don't know.

11. (Quiz Question 3) Under the Electoral College, if no candidate receives a majority of electoral votes, which body picks the president? The...

    a. U.S. House of Representatives.
    b. U.S. Senate.
    c. U.S. Supreme Court.
    d. I don't know.

12. (Quiz Question 4) Is the following statement true or false?: The District of Columbia (that is, Washington, D.C.) participates in the Electoral College.

    a. True
    b. False
    c. I don't know

13. (Quiz Question 5) Is the following statement true or false?: The U.S. Constitution's creators designed the Electoral College to protect the interests of rural areas.

    a. True
    b. False
    c. I don't know

14. (Quiz Question 6) Is the following statement true or false?: The Electoral College system encourages presidential candidates to campaign in a diverse range of states.

    a. True
    b. False
    c. I don't know

15. (Quiz Question 7) Think of the 100 largest cities in the U.S. What proportion of the U.S. population do you think lives in those 100 cities?

    a. Under 25%
    b. 25%-50%
    c. 51%-75%
    d. Over 75%
    e. I don't know

16. How well do you think Americans generally score on the previous Electoral College quiz? Out of 7 questions, they know the answer to a…

    a. high number of questions (6-to-7 questions).
    b. medium-high number of questions (4-to-5 questions).
    c. medium-low number of questions (2-to-3 questions).
    d. low number of questions (0-to-1 questions).

17. How well do you think you scored on the previous Electoral College quiz? Out of 7 questions, I knew the answer to a…

    a. high number of questions (6-to-7 questions).
    b. medium-high number of questions (4-to-5 questions).
    c. medium-low number of questions (2-to-3 questions).
    d. low number of questions (0-to-1 questions).

18. Since the first polls were taken on the subject the 1940s, a majority of Americans have said that the presidential candidate who receives the most popular votes nationwide ought to win the election. As of approximately one year ago, 65% of Americans thought this should be the practice.

    Imagine a friend who generally has the same political views as you. You learn, however, that you disagree about the current Electoral College system. How much would their position on the subject affect your position on the subject? It would make…

    a. no difference.
    b. a small difference.
    c. a medium difference.
    d. a large difference.

19. Imagine a party leader who generally has the same political views as you. You learn, however, that you disagree about the current Electoral College system. How much would their position on the subject affect your position on the subject? It would make…

    a. no difference.
    b. a small difference.
    c. a medium difference.
    d. a large difference.

20. As you may know, the way the Electoral College system currently operates, presidential campaigns generally ignore noncompetitive states. They have little reason to pay attention to states they know they will win or lose. Think about people in noncompetitive states who share your political views. Currently, such people (who, to repeat, share your political views) are largely ignored by presidential campaigns. In general, how excited would you be if presidential campaigns, instead of ignoring them, mobilized them, too?

    a. Highly excited
    b. Moderately excited
    c. Slightly excited
    d. Not at all excited

21. Imagine you are an enemy of the United States. You aim to create uncertainty, distrust, and discord among Americans. Which presidential election system would make it easier to do so?

    a. The current Electoral College system (in which close results in competitive states may determine the election's outcome)
    b. A national popular vote system (in which the candidate who receives the most popular votes nationwide wins the election)
    c. I'm not sure

22. Because of the way electoral votes are distributed among the states, unless you reside in Wyoming (the state with the smallest population), someone else's vote for president counts more than yours. How upsetting is this fact to you?

    a. Highly upsetting
    b. Moderately upsetting
    c. Slightly upsetting
    d. Not at all upsetting
    e. I reside in Wyoming

23. The way the Electoral College system currently operates, the candidate who receives the most popular votes nationwide may not win the election. How upset would you be if the candidate you preferred received the most popular votes nationwide but did not win the election?

    a. Highly upset
    b. Moderately upset
    c. Slightly upset
    d. Not at all upset

24. If you had to guess, all other things being equal, how much is the president influenced by people who live in competitive states? All other things being equal, I think the president is…

    a. highly influenced by people who live in competitive states.
    b. moderately influenced by people who live in competitive states.
    c. slightly influenced by people who live in competitive states.
    d. not at all influenced by people who live in competitive states.

25. Which do you think is more important? It's more important that…

    a. the candidate who receives the most popular votes nationwide wins the election.
    b. a state's electoral votes be cast for the presidential candidate who receives the most popular votes in that state.

26. How interested would you be in learning more about the Electoral College system?

    a. Highly interested
    b. Moderately interested
    c. Slightly interested
    d. Not at all interested

27. Attempting to win the 2020 presidential election, Donald Trump's campaign tried to have alternative electors appointed in seven competitive states. Was the campaign right or wrong to do so?

    a. Right
    b. Wrong
    c. I'm not sure

28. Do you believe the following statement is true or false?: Attempting to win the 2020 election, Donald Trump pressured Vice President Mike Pence to reject states' electoral vote results.

    a. True
    b. False
    c. I don't know

29. With one word, describe the Electoral College system as it currently operates (that is, a candidate who receives a majority of the electoral votes wins the election, regardless of which candidate receives the most popular votes nationwide).

30. It's very difficult to amend the Constitution (since 1791, only seventeen amendments have been ratified; it's been 53 years since a newly initiated one was passed). With that in mind, with one word, describe the Electoral College system if it operated under a compact (that is, a binding agreement) between states which effectively would result in a national popular vote for president (in other words, the compact would ensure that the candidate who receives the most popular votes nationwide wins the election).

Answer Key

Question 9: b; Question 10: c; Question 11: a; Question 12: a; Question 13: b; Question 14: b; Question 15: a; Question 28; a.

Section One
The Creation, Ratification, and Evolution of the Electoral College

II.1.

Electing a President: The Origins of the Electoral College

John P. Kaminski

The creation of the American presidency was the single most difficult task faced by the Constitutional Convention of 1787. In addition to the many theoretical studies of government, the Convention delegates drew upon the history of ancient Greece and Rome, the Bible, the Enlightenment, English history, and the American experience with the British king, the colonial and state governors, and the American presidency under the Articles of Confederation. From these they crafted a new executive authority.

The method of electing the president considered four interconnected issues:

- should there be a single or a plural executive,
- who should elect the President,
- how long should the term of office be, and
- should the President be eligible to be re-elected.

Drawing upon the Convention's rule that allowed any issue to be reconsidered even after having been agreed upon, the issues concerning the election of the President were continually rehashed over three months until the final version was submitted to the Committee of Style on 8 September and reported four days later.

The Convention first considered the American presidency when Governor Edmund Randolph presented the Virginia plan of government on 29 May that called for the election of an executive chosen by Congress to serve an unspecified number of years and to be ineligible for re-election. The Convention considered Virginia's proposal in a Committee of the Whole. On 1 June, James

Wilson of Pennsylvania and Charles Pinckney of South Carolina moved in favor of a single executive. John Rutledge of South Carolina agreed, but Roger Sherman of Connecticut suggested that Congress should be allowed to determine the issue "as experience might dictate." Declaring that a single executive would be "the foetus of monarchy," Governor Randolph favored a plural executive composed of three members from three different districts. The debate continued in the Committee of the Whole on 2 and 4 June, whereupon a single executive was accepted by a vote of seven states to three with one state divided.

On 15 June, William Paterson of New Jersey submitted a proposal for amendments to the Articles of Confederation (i.e., the New Jersey Plan) which called for the election of a plural executive by Congress to be ineligible for re-election. A month later, on 17 July, the Committee of the Whole unanimously agreed on a single executive. On 26 July, the Convention approved a single executive who would serve for seven years and be ineligible for re-election by a vote of six to three with two states divided.

On 26 July, all of the resolutions that had already been approved by the Convention were submitted to a Committee of Detail that was to arrange them in the form of a draft constitution. The Committee of Detail reported on 6 August a provision for a single executive. On 24 August, the Convention unanimously approved a single executive.

The consideration of the other issues concerning the election of the President also began on 1 June in the Committee of the Whole. James Wilson, citing the successful popular election of governors in Massachusetts and New York, favored the election by the people. Roger Sherman favored election by Congress. Both Wilson and Sherman favored a three-year term (similar to New York's governor) with re-eligibility for successive election. Charles Pinckney and George Mason favored a seven-year term with no re-eligibility. Gunning Bedford of Delaware favored a three-year term with ineligibility after nine years. The Committee of the Whole accepted a seven-year term by a vote of five states to four with one state divided.

Some delegates opposed the popular election of the President because they lacked confidence in the knowledge and judgment of the people while others believed that the large states would have too great an influence in such an election. James Wilson, however, reiterated his support for election by the people. Charles Pinckney and Hugh Williamson of North Carolina supported election by Congress while John Rutledge supported election by the Senate.

On 2 June, Wilson announced his support for dividing the country into districts in which electors would be elected by the people without any intervention by the state legislatures. This method was similar to the manner in which Maryland state senators were elected: the state constitution of 1776 provided that the freeholders in each city and county would elect electors who would meet on the same day in Annapolis (or some other location) where at least twenty-four of them would vote to elect fifteen senators (nine from the western shore and six from the eastern shore) who were "men of the most wisdom, experience[,] and virtue."

Gerry opposed election by Congress because it would encourage political intrigue. Instead, Gerry favored election by the state legislatures. Wilson's elector proposal was rejected seven to two; a term of office for seven years was approved eight to two; and ineligibility for re-election after serving the seven-year term was approved seven states to two with one state divided.

On 9 June, Gerry proposed the election of the President by the state governors. Randolph opposed this proposal, which was rejected by nine states with one state divided. On 13 June, the Committee of the Whole submitted its report to the Convention. It provided for a single President, a seven-year term, and no eligibility for a second term.

On 18 June, Alexander Hamilton delivered a lengthy speech that lasted several hours in which he opposed both the Virginia Plan and the New Jersey Plan. Instead, Hamilton favored a President with life tenure to be elected by electors chosen by the people. Although sympathetic to this proposal, no delegate outwardly supported Hamilton's position.

After a month's hiatus from the question of the election of the President, the delegates re-visited the issue on 17 July. Gou-

verneur Morris opposed the election by Congress as a "work of intrigue, of cabal, and of faction," comparing it to an election by a "conclave of cardinals." He preferred an election by the freeholders. Sherman still favored election by Congress, while Wilson favored an election by the people. Pinckney still favored election by Congress, while Gouverneur Morris supported the choice by the people. Mason compared the election by the people to the trial of color by a blind man. The Convention then defeated an election by the people by a vote of nine states to one, with Pennsylvania alone casting a supporting vote.

Luther Martin of Maryland and Jacob Broom of Delaware then proposed an election by electors appointed by the state legislatures, which was rejected eight states to two (Maryland and Delaware). The Convention then voted unanimously to accept election by Congress, and then voted six states to four to eliminate the ineligibility provision.

Broom then supported a shorter term for the President. James McClurg of Virginia and Gouverneur Morris moved for tenure for good behavior, which Sherman opposed and the Convention rejected six states to four. A vote to strike out the seven-year term was also defeated by the same six to four vote.

On 19 July, Oliver Ellsworth of Connecticut and Jacob Broom moved to strike out election by Congress in favor of election by electors chosen by the state legislatures and apportioned by population. This proposal was accepted by a vote of six to three with one state divided. The Convention then voted eight to two to elect electors by state legislatures. Luther Martin and Hugh Williamson then moved that the President should be ineligible for re-election, which was defeated by an eight to two vote. The seven-year term was then defeated five states to three with one divided state. Ellsworth and Williamson then moved for a six-year term, which was accepted on a nine to one vote with Delaware being the sole negative vote.

On 20 July, the Convention voted six to four that presidential electors should be chosen by state legislatures apportioned by population. The Convention then unanimously prohibited members

of Congress, federal officeholders, or candidates for the Presidency from being presidential electors.

On 23 July, the Convention voted seven states to three to reconsider the election by electors chosen by state legislatures. The next day, William Houston of Georgia and Hugh Williamson moved that Congress should elect the President because it would be improbable "that capable men would undertake the service of Electors from the more distant States." The Convention approved the motion seven states to four.

On 25 July, Oliver Ellsworth proposed that the President should be elected by Congress for the first term but that he be subsequently elected for a second term by electors chosen by state legislatures. Elbridge Gerry proposed that the President should be elected by state governors and their councils or, if no councils existed, by electors chosen by the state legislatures. Madison then stated his opposition to the election of the President by Congress, by state legislatures, or by state governors. He preferred election by electors chosen by the people who would meet only once, but because that process had recently been defeated, he preferred election by the people "or by the qualified part of them," even though it worked against smaller states and Southern states. Another disadvantage would be that people might limit their vote to "a Citizen of their own State." At this point, Ellsworth's motion was defeated seven states to four. Pierce Butler of South Carolina favored election by electors chosen by state legislatures. Charles Pinckney then proposed election by Congress with the President being eligible to serve six years within a twelve-year period. Mason and Gerry agreed with Pinckney's proposal. Gouverneur Morris opposed any term limitation. Hugh Williamson then proposed that the people should vote for three candidates; Gouverneur Morris for two. Gerry expressed his fear that the people might be led by a nationwide faction such as the Society of the Cincinnati. John Dickinson of Delaware suggested that Congress or electors chosen by Congress should elect the President from perhaps the thirteen candidates with the most popular votes in their states. At this point, Pinckney's motion for service limited to six years within a twelve-year period was rejected by a vote of six to five.

The next day, 26 July, George Mason summarized the various election proposals indicating that they all seemed to be flawed. Perhaps, he thought, the first proposal—election by Congress—was the best; consequently, he moved that the provision in the Committee of the Whole's report that had called for the election by Congress for a seven-year term with ineligibility for a second term be accepted. Wiliam R. Davie of North Carolina seconded the motion, which was adopted seven states to three with one state divided. A provision for a single President was added by a six to three state vote with two states divided.

The Committee of Detail reported on 6 August. The tenth article in the draft constitution provided for the election of a single President by Congress for a seven-year term to be ineligible for a second term.

On 24 August, a motion by Daniel Carroll of Maryland and James Wilson to elect the President by the people was rejected nine states to two. A motion to elect the President by a joint ballot of Congress was approved seven states to four. Gouverneur Morris opposed a congressional election. A motion by Morris and Daniel Carroll to have electors elected by the people choose the President was rejected six states to five. Morris then opposed the ineligibility provision, but a vote on that issue was postponed. A week later, on 31 August, on motion of Morris, the election by Congress was deleted from the report of the Committee of Detail by a vote of nine states to one with one state divided.

On 4 September, the Committee of Postponed Parts reported a new method of electing the President similar to the final version but with the Senate electing the President if a tie vote occurred or if no one received a majority of the electoral votes. The re-eligibility prohibition was also deleted. Morris gave his reasons for the change, while Mason, Butler, and Pinckney opposed the role of the Senate in electing the President if the electors' vote was inconclusive. Opposition to the Senate's role persisted over the next two days with some delegates opposing the increase in the powers of an already too powerful Senate. Hugh Williamson argued that allowing the Senate to elect the President "lays a foundation for corruption and aristocracy," while James Wilson stated that the

President would "not be the man of the people as he ought to be, but the Minion of the Senate."

A number of changes were proposed on 6 September. Richard Dobbs Spaight and Hugh Williamson moved that the term of office be changed from four to seven years; the motion was rejected eight states to three. They then proposed a six-year term that was similarly rejected by a nine to two vote. The four-year term was then approved by all of the states except for North Carolina. It was then agreed by a nine-to-two vote that the President should be chosen by electors chosen in a manner determined by each state legislature. A proposal by Spaight and Wiliamson requiring the electors to meet in the federal capital was rejected by all of the states except for North Carolina. It was then voted by eight states to three that the electors should meet and vote on the same day, which would reduce the likelihood of political intrigue. Finally, after several proposals concerning the Senate's role in electing the President when no candidate received a majority of the electoral votes, Roger Sherman moved and the Convention agreed ten states to one that the House of Representatives, voting by state delegations, should elect the President. On 8 September, this final version was submitted to the Committee of Style, which submitted its written report on 12 September. Subsequently, the Convention made only a couple of minor changes in wording.

The Electoral College in the Ratification Debate, 1787-1788

The American presidency was one of the central issues during the debate over the ratification of the Constitution in 1787 and 1788. Most of the attention on the Presidency focused on the powers of the office with relatively little sustained discussion of the election process. Federalists agreed with Charles Carroll of Carrollton in Maryland that "the sagacity of man" could not "devise a mode better calculated to exclude bribery and cabal." Charles Cotesworth Pinckney of South Carolina agreed, suggesting that the election of the President "could not have been placed so well if it had been made in any other mode." Others, like Alexander Hamilton, writing as "Publius," in *The Federalist* No. 68, maintained that the

electoral system would preclude foreign influence and forestall "tumult and disorder." In commenting on the electoral process, Governor Edmund Randolph in the Virginia ratifying Convention on 17 June 1788 said that "on considering it attentively and coolly, I believe it will be found less exceptional than any other mode." On the following day, Randolph's fellow Convention delegate James Madison asserted that despite their opposition, Antifederalists failed to present a viable alternative. Previously, in *The Federalist* No. 39, Madison had favorably likened the indirect election of the President with the indirect election of most state governors, U.S. senators, and Maryland's state senators.

Antifederalists argued that the Constitution would destroy the sovereignty of state legislatures. Federalists, like James Wilson of Pennsylvania, denied this assertion, stating that the new Constitution would not annihilate the state legislatures because they were needed to allow the federal government to function in electing senators and appointing presidential electors. Responding to this Federalist argument, Antifederalists asserted that the Constitution would essentially destroy the state legislatures, leaving only skeletal legislatures that would continue to elect senators and appoint presidential electors but that otherwise would be powerless. Some Antifederalists even argued that electors would be chosen for life, thus negating the need for state legislatures for elections every four years.

Antifederalists asserted that the electoral vote would be un-democratic. Many, like Richard Henry Lee, preferred the election of the President by the people. Mercy Otis Warren, in her pamphlet signed with the pseudonym "A Columbian Patriot," argued that the ten Massachusetts electors could not possibly adequately represent the wishes of the state's large population. A Federalist newspaper correspondent writing as "One of the People" in the *Maryland Journal*, 25 December 1787, felt that Virginia would be adequately represented with one-eighth of the total number of presidential electors. Rawlins Lowndes of South Carolina believed that no one from a small state like his South Carolina would ever be elected President. Rather, only residents of the middle states would be elected. Charles Cotesworth Pinckney

disagreed, stating that South Carolina would have one-thirteenth part of the vote in the House of Representatives, and a South Carolinian might indeed be elected President as had been the case in the Continental Congress where ballots were cast by state delegations.

Antifederalists argued that after the election of George Washington, few candidates would receive a majority of the electoral votes. Consequently, it was likely that the final election of a President would often be determined by the House of Representatives voting by state delegations. Many Antifederalists, like George Mason of Virginia, condemned election by the House of Representatives as un-democratic, describing it as "a mere *ignus fatuus*," that is, a delusive hope. "An Old Soldier" in the *Connecticut Gazette* on 4 January 1788 preferred the popular election of the President. George Lee Turberville, a Virginia planter, warned that the vote of fifteen U.S. Representatives could elect the President by achieving majorities in seven small state delegations. Some Antifederalists denounced the fact that the House would choose from the five candidates with the most electoral votes, suggesting that the choice should be limited to the top-two candidates.

Massachusetts and Virginia Antifederalists complained that their states would be outvoted by the small state delegations in the presidential elections in the House of Representatives. Some Antifederalists asserted that each state would have one thirteenth part in electing the President in the House of Representatives, which was obviously un-democratic when considering the population differentials between large states such as Massachusetts and Virginia and small states such as Delaware and Rhode Island. A society of western gentlemen in Virginia preferred per capita voting in the election of the President in the House of Representatives.

In a lengthy pamphlet, William Petrikin of Carlisle, Pennsylvania, condemned the electoral process as "another excellent regulation, most wisely calculated to render him [i.e., the President] the obsequious machine of Congress." In an Antifederalist pamphlet, James Monroe charged that the President would owe his election to the state governments and not to the people. He also felt that senators should not be counted in assigning presi-

dential electors for each state. He also objected to the election by the House of Representatives that would favor the small states. "Federal Farmer," probably Elbridge Gerry of Massachusetts, in his second Antifederalist pamphlet praised the system as "a judicious combination of principles and precaution," but asserted that it could be improved by increasing the number of electors, which would make corruption less likely during the interval between the election of the electors and the election of the President.

The First Presidential Election, 1789

On 21 June 1788, New Hampshire became the ninth state to ratify the Constitution, thereby satisfying the requirement in Article VII of the Constitution for the implementation of the Constitution among the ratifying states. Three months later, on 13 September, the Confederation Congress adopted an election ordinance that provided for the process of electing the first President and Vice President. Presidential electors were to be elected on 7 January 1789. They were to vote in their state capitals on 4 February 1789. The electors chose George Washington as President and John Adams as Vice President. The ballots were sent to Congress where they were counted in a joint session of Congress on 6 April 1789 in the Senate chamber presided over by John Langdon, president pro tempore of the Senate.

In the first presidential election, five legislatures appointed their presidential electors (New Hampshire, Connecticut, New Jersey, South Carolina, and Georgia), while the other five participating states had the people choose their presidential electors (Massachusetts, Pennsylvania, Delaware, Maryland, and Virginia). Rhode Island and North Carolina did not participate in the election because they had not yet ratified the Constitution, while New York did not participate because its bicameral legislature could not agree on the method of selecting presidential electors.

Epilogue

The Founders expected that the final election of the President would occasionally be decided by the House of Representatives.

Problems with the electoral process became evident after George Washington's retirement. In the 1796 election, opposing candidates—John Adams and Thomas Jefferson—were chosen President and Vice President. In the following election in 1800, John Adams (the incumbent) was defeated by Jefferson and Aaron Burr who both received the same number of electoral votes. Much political intriguing occurred when Burr refused to defer to Jefferson, who was universally expected to be the presidential candidate. Only after thirty-six ballots did the House of Representatives elect Jefferson. Soon thereafter, the Twelfth Amendment, which called for the separate electoral balloting for the President and Vice President, was proposed on 9 December 1803 and then ratified on 15 June 1804.

II.2.

James Wilson and Election 2024

Michael H. Taylor

It is a presidential election year again. One of the Founding Fathers —James Wilson—who has historically received scant attention is at the forefront of today's news. Not him personally, but his creation, the Electoral College.

When I taught seniors at Turner Ashby High School in Bridgewater, Virginia, before embarking on a life as a college professor, we would track campaign stops of both presidential candidates every four years. Each election cycle, I would hang up a map from C-SPAN in my room with the electoral votes for each state. Tracking the presidential candidates allowed students to see, in real time, why and importantly where candidates spent their valuable time and money.

During the Constitutional Convention in the summer of 1787, delegates found it difficult to agree on a method to elect the new and potentially powerful chief executive that they were creating. On Friday, June 1st, James Wilson made a motion that the "Executive consist of a single person."[1] Why, after just winning the Revolutionary War against the British Empire, did Wilson—a Scotsman who immigrated to America in 1765 during the upheaval during the Stamp Act Crisis—seek the creation of such a powerful elected office? He said that "unity in the Executive instead of being the fetus of monarchy would be the best safeguard against tyranny."[2] This was in response to Virginia's Governor Edmund

[1] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton & Company, 1987), 45.
[2] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton & Company, 1987), 47.

Randolph who had argued that the Executive should consist of three men, not just one. On that day, the delegates were not ready to adopt a single executive, but instead agreed that there would be a National Executive—they just didn't know what that would look like.

Instead, delegates moved on to how the Executive would be selected. James Wilson was again the first delegate to address the issue. He said he "was almost unwilling to declare the mode which he wished to take place, being apprehensive that it might appear chimerical."[3] His method? A direct election by the American people themselves. He pointed to experience in electing governors in both New York and Massachusetts. Delegates were not supportive in the slightest. Fellow delegates proposed appointment by Congress, which held sway for much of the summer.

The next session, Saturday, June 2nd, James Wilson brought forth an initial plan that would evolve into the Electoral College. States would be divided into presidential electoral districts where voters would first elect delegates to a state convention to select a president. These delegates would then gather at an appointed time and place to jointly elect a president.

The length of a presidential term was also hotly contested as some delegates argued for a short term of three years and others for as long as seven. The longer the term, the more likely the president would be ineligible for re-election. This then led to a discussion on how to remove a president due to misconduct before the next election.

John Dickinson, James Wilson's law tutor after he came to America and close friend, proposed that a majority of state legislatures could remove a president from office; this was defeated. He then modified his motion to reflect removal by Congress after a request of a majority of state legislatures, which also failed. Ultimately, the delegates would separate the power of impeachment between the House of Representatives and the Senate. The House would have the power to impeach the president, which would then transfer to the Senate for a trial. Senators would serve both as judge

[3] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton & Company, 1987), 48.

and jury in the trial. A provision was included that the Chief Justice of the Supreme Court of the United States would be the presiding officer in any impeachment, but any ruling they made could be overturned by senators.

Over the course of the summer, James Wilson came back to the election of the president time and again—in essence, he wore down his fellow delegates to move towards what we now know as the Electoral College.

On July 18th, delegates were once again debating how to elect a president. Nathaniel Ghorum of Massachusetts stated that he preferred appointment by the Senate, rather than the whole Congress. Wilson didn't like this, but felt that it was a step in the right direction.

The very next day, the issue remained with how to choose a president. Debate began to take on a circular nature, with no issue remaining settled for long. The length of term, eligibility for re-election, and method of election meant that a change to any one of the three meant new debate on them all. On this day, Wilson noted, "It seems to be the unanimous sense that the Executive should not be appointed by the Legislature, unless he be rendered in-eligible a 2d time: he perceived with pleasure that the idea was gaining ground, of an election mediately or immediately by the people."[4] This optimism would not last long.

On Tuesday, July 24th, delegates were debating everything related to the Executive again. In frustration, Wilson put forth a proposal. The president would serve for a term of six years. The method of election would be fifteen members of Congress, drawn by lot, "who should retire immediately and make the election without separating."[5]

Not until Tuesday, September 4th, did the Constitutional Convention finally begin to commit to the presidential election system as we recognize it. A committee had been created to try to draft language to address "the postponed parts of the Constitution,

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[4] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton & Company, 1987), 326.

[5] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton & Company, 1987), 359.

& parts of Reports not acted upon."[6] The committee report put forth the Electoral College as we know it. How did we get from a selection by Congress to the Electoral College? Delegates were tired and wanted to finish their work, so Wilson's resistance began to pay off. He also had an ally on the committee—fellow Pennsylvania delegate Gouverneur Morris.

As presidential elections come and go, one thing has remained constant since the first election in early 1789: the Electoral College, not the people of the United States, elects a president. Authors have called the Constitution "A Bundle of Compromises" and the Electoral College is one of them. James Wilson wanted a direct election by the people, which would favor the large states. John Dickinson wanted a method that would take the concerns of small states into consideration and the result was our current system. If a popular vote was the means of election, then presidential candidates would spend the vast portion of their time and money in urban areas, to the detriment of rural America. The Electoral College requires a national campaign, the only exception was the election of 1860 when Abraham Lincoln was not even on the ballot in the South and thus was elected by voters in the North, Midwest, and the far West.

As you watch presidential candidates travel from state to state, please remember James Wilson, the Founding Father who created the Electoral College.

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[6] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton & Company, 1987), 569.

II.3.

John Dickinson, the Electoral College, and the Challenges of Democracy

Jane E. Calvert

At the Federal Convention, the mode of choosing the president was among the most contentious topics. Because of the winding road the delegates took to reach the solution—what we now call the Electoral College—scholars and commentators have generally simplified the explanation of its origin by describing it as being wholly about one thing or another—the delegates' distrust of the people or to perpetuate slavery. In reality, the Electoral College was about both and more. Examining the perspective of John Dickinson, a delegate from Delaware and one of the architects of the Electoral College, who neither distrusted the people nor supported slavery, sheds light on the Framers' intentions and how we might proceed at this moment in American politics.

Dickinson's view is worth consideration, as his experience and contributions to the American Founding were more extensive than any other delegate's. Among other posts, he had served one of the largest colonies/states, Pennsylvania, and one of the smallest, Delaware, for years as a legislator, member of Congress, and chief executive. He wrote more for the American cause than any other figure, including the first draft of the Articles of Confederation (1776), with provisions, later excised, that anticipated many of the problems that led to the Federal Convention. He also served as chairman of the Annapolis Convention (1786) that called for the Federal Convention. His personal views were also unique. Hailing from a devout Quaker family, although he himself was not formally a Quaker, he embraced their views on the equality of individuals, which led him to, among other things, advocate women's rights and

become an abolitionist. By 1787, he had freed all those individuals he had enslaved and attempted to secure passage of an abolition bill in Delaware. Despite scholars mostly ignoring Dickinson's contributions at the Convention, they were significant. Among other things, he offered the solution to the problem of representation that we now call the Connecticut Compromise; and he was one of the few to argue against slavery and take steps to limit it.[1] He also made important contributions to defining the presidency and how that office should be filled.

There were several main concerns that shaped the debate on the presidency. The overarching goal of the Convention was to balance the freedom of the people with the power of the government. Put another way, the delegates sought to limit licentiousness (abuse of liberty) by the people and the potential for tyranny (abuse of power) by the government. Dickinson described this goal as protecting the worthy—those who observed the laws—from the "passions" of both the people and their servants, including the president.[2] Other objectives related to the executive branch in particular were that the states be invested in the workings of the federal government; that the most populous states did not overpower those with fewer voters; that the legislative and executive powers remain separate; and determining what role the people should have in presidential elections.

Balancing liberty and power was especially challenging when it came to the executive branch. Safeguards against a tyrannical president could come in many forms. In addition to advocating impeachment for misbehavior and prosecution for criminal acts,[3] on which all delegates agreed, Dickinson wanted the president to

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[1] For more on Dickinson, see Jane E. Calvert, *Penman of the Founding: A Biography of John Dickinson* (New York: Oxford University Press, 2024).

[2] Fabius [John Dickinson], "Observations on the Constitution proposed by the Federal Convention, No. V," *The Pennsylvania Mercury and Universal Advertiser*, April 22, 1788.

[3] *Trump v. United States*. Brief *Amici Curiae* of Scholars of the Founding Era in Support of Respondent. April 8, 2024. *The Supreme Court of the United States*: https://www.supremecourt.gov/DocketPDF/23/23-939/307088/20240408173320339_23-939%20Brief.pdf.

be both weak and popularly elected.[4] He therefore preferred a plural executive, like the Supreme Executive Council of Pennsylvania, over which he himself had presided for three years.[5] He liked that there were "independent spirits" checking him.[6] This idea got little traction, and the Convention quickly decided on a singular executive, despite some delegates, including Dickinson, believing that it could plant the seed of monarchy.

The delegates agreed even less on how the president should be elected. Early in the deliberations, Dickinson had expressed his preference that it be directly by the people. When Elbridge Gerry expressed his deep distrust of the people, arguing that allowing them to choose would be "radically vicious," Dickinson responded that "the best and purest source" of executive power was the people.[7] Indeed, he trusted them more than most. For twenty-five years he had been drawing ordinary Americans into public debates by explaining to them the important legal and political elements of British and American policy. But, again, those who agreed with him were in the minority. All delegates feared pure democracy, considering it as "mobocracy." Some wanted to exclude the people from any direct role in government, believing that they were lacking in virtue (disinterestedness) and liable to vote a demagogue into power. But a degree of democracy was the Convention's only hope to preserve the republic. "The wit of man never invented such an antidote against monarchical and aristocratical projects, as a strong combination of truly democratical republics," Dickinson explained, "in which all the officers are from time to time chosen by the people."[8]

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[4] Of course, it should be noted that Dickinson did not advocate universal male suffrage; he also argued for property requirements for voting. This was not an argument for aristocracy but rather for a patriotic connection to the land. Ibid., 2:202, 207.

[5] Ibid., 2:542.

[6] An Enemy to Injustice [John Dickinson], "To a Friend to Justice," *Pennsylvania Journal*, February 19, 1793.

[7] Farand, 2:114.

[8] Fabius [John Dickinson], "Observations on the Constitution proposed by the Federal Convention, No. VII," *The Pennsylvania Mercury and Universal Advertiser*, April 26, 1788.

The solution to the election problem came when Dickinson's former law clerk, James Wilson of Pennsylvania, introduced the idea of an elector system, whereby a select group of men would choose the president. The Convention eventually embraced the plan, which was intended in part to reinforce the traditional socio-economic hierarchy that had always existed in America. In no sense were the delegates interested in establishing an American "aristocracy," but they did intend to stem the rising tide of democracy through use of representatives, what James Madison called the "filtration of talent" and Thomas Jefferson called the "natural aristocracy." The electors would come from the states, giving the states a stake in choosing the executive, and their number would equal the total number of representatives the state had in Congress. Dickinson approved of the plan, convinced that "Cooperation of the several States" in the presidential election would be "the Basis of our federal Fabrick."[9] Not only would it strengthen federalism, it would ensure that, as with representation in Congress, small states such as Delaware would not be swallowed up by the large, populous states. There was, however, an unfortunate by-product: The southerners also liked the plan because, in mirroring elections for Congress, it extended the three-fifths clause to the election of the president. Dickinson hated any expansion of slave power; and he abhorred the three-fifths clause, objecting that it "found[ed] a Right to govern Freemen on a power derived from Slaves, . . . themselves incapable of governing—yet giving to others what they have not."[10] He had advocated representation based on taxation rather than population. For Dickinson, it was the most regrettable compromise of the Convention.

When the Committee of Eleven met to settle the details of electing the president, debilitating headaches prevented Dickinson from joining until it was adjourning. The members informed him that the electors would be chosen by the legislature. But although Dickinson agreed with appointing electors at the state level, he objected to the committee's decision to assign the task to Congress.

[9] John Dickinson to George Logan, January 16, 1802. John Dickinson Papers, Library Company of Philadelphia.

[10] Calvert, *Penman of the Founding*, 357.

Not only did he think that the plan improperly mixed legislative and executive powers, potentially making the president a creature of Congress, he believed that the electors should be chosen by the people. "What signifies speaking of Representatives in a state," he queried, "if the people will not chuse Representatives[?]" He observed that the people would be loath to accept a president as powerful as the Constitution established unless they were "immediately concerned in his Election." He should be "the Man of the People." Accordingly, Gouverneur Morris suggested they resume deliberations, and James Madison revised the article of the Constitution to provide that the state legislatures shall merely direct the appointment of electors.[11] In hindsight, Dickinson regretted that Madison had not been more specific. For decades after ratification of the Constitution, most state legislatures appointed the electors themselves, and Dickinson wished that the words "to be chosen by the people" had been inserted in the article. "I can affirm," he said, "that the Intention of that Assembly was—that the Electors should be chosen by the People, and not appointed by the Legislatures of the States."[12] By 1864, the states finally obliged.

Despite Dickinson's not getting the direct popular election he wanted, he saw some benefit in the elector plan. He trusted the "Virtue and good Sense of the people," but he also knew their limits.[13] Writing as "Fabius" in 1788 to encourage ratification, he explained, "This president is to be chosen, not by the people at large, because it may not be possible, that all the freemen of the empire should always have the necessary information, for directing their choice of such an officer."[14] To Dickinson, the people were not "vicious"; they were merely uninformed. Therefore, the "most signally qualified" men would be "appointed by the people" and would "dedicate their votes to the best interests of their country."[15]

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[11] John Dickinson to George Logan, January 16, 1802. John Dickinson Papers, Library Company of Philadelphia.

[12] Ibid.

[13] Ibid.

[14] Fabius [John Dickinson], "Observations on the Constitution proposed by the Federal Convention, No. II," *The Pennsylvania Mercury and Universal Advertiser*, April 15, 1788.

[15] Ibid.

Dickinson may have hoped for a time when electors would be unnecessary. He never ceased working to elevate ordinary Americans and bring them into the national political dialogue. Even before the Federal Convention, he was using his vast wealth to increase public knowledge, focusing on establishing and funding schools for poor children, libraries, and other endeavors to advance public civic education. The curriculum he prescribed would give even the most disadvantaged child a foundation for engaged and disinterested citizenship—the study of history and Classical languages in order to read about the Greek, Roman, and modern European antecedents of our government, and both religion and science to instill salutary habits of the heart and mind. Moreover, he wanted education for poor children of both races and genders and all religions, suggesting that he envisioned a future when the people—all of them—were educated enough that the franchise could expand beyond elite, white, Protestant men.[16]

Yet, although Dickinson had infinite faith in the American people, he also feared for them, imagining a future in which there would be "more passion, less Virtue, and greater Temptations of Power and Wealth flaunting before the Eyes of the Ambitious and the rapacious."[17] He was not wrong, but he could hardly have imagined twenty-first century America. Today the country bears little resemblance to the world that gave us the Electoral College: We assume individual equality within a vastly expanded citizenry, we have universal suffrage with no property requirements, and we have an extensive public education system and free-flowing information online. But in some ways, we face the same problem that the Framers confronted—uninformed voters. And now, the problem is caused by a failing public education system; a culture of rampant individualism; a polarized party system; disinformation from partisans and foreign governments; and voters who are disillusioned, apathetic, driven by emotion, and disenfranchised by discriminatory voting laws and districting. Ironically, now more than ever we could use electors to save us from ourselves and unscrupulous

[16] See Calvert, *Penman of the Revolution*, 317, 326, 330, 347–51, 374, 392–94, 437–38.

[17] Dickinson to Logan, January 16, 1802.

politicians. Yet we also know that electors possess no more virtue or knowledge than the people at large, evidenced starkly in 2016 when they handed the presidency to the most dangerous demagogue in the nation's history.

Now, in the wake of the 2024 election with the same candidate winning both the popular vote and the Electoral College, it is clear that America's problems run much deeper than the Electoral College. Whether from ignorance of or disregard for the most basic American principles of equality and liberty, the American people have overwhelmingly embraced a tyrannical government and a quasi-aristocratical social order. With the Department of Education on the chopping block and an inaccurate and partisan national curriculum proposed by the 1776 Commission,[18] John Dickinson's idea of civic education is unlikely to help us now.

[18] Lindsey M. Burke, "Department of Education" in *Mandate For Leadership: The Conservative Promise* (Washington, D.C: The Heritage Foundation, 2023), 319; "AHA Statement Condemning Report of Advisory 1776 Commission," *American Historical Association*: https://www.historians.org/news/aha-statement-condemning-report-of-advisory-1776-commission/. Accessed 11-07-2024.

II.4.

The Convoluted Origins of the Electoral College

Rosemarie Zagarri

During the debate over the ratification of the US Constitution, Alexander Hamilton wrote in *Federalist* #68, "I venture . . . to affirm, that if the manner of [electing the president] be not perfect, it is at least excellent."[1] Given Hamilton's initial enthusiasm for the Electoral College, how could he have been so wrong? And how did the Electoral College become one of the least understood and most unpopular institutions in the country today? To answer this question, we must go back to the founding era of American history and explore what the framers of the US Constitution thought they were doing when they created this system for electing the president.

The structure of the Electoral College reflects the fundamental tension that Americans faced at the time they drafted the Constitution; that is, the tension between the people as the basis of representative government and the states as the basis of the union. From the time of the American Revolution until 1789, Americans united together under the Articles of Confederation. Designed as a loose union among the thirteen original states, Congress emerged as the governing entity for the country. Congress itself was unicameral, made up of a single chamber. No separate executive or judiciary checked congressional power. Each state government also retained a great deal of autonomy and authority over the governance of their internal affairs. State legislatures (not the voters in the states) elected representatives to the Confederation Congress.

[1] Alexander Hamilton, *Federalist* #68, in *The Federalist Essays*, https://avalon.law.yale.edu/18th_century/fed68.asp.

Each state had only one vote in Congress, no matter how many people resided in the state or how many representatives they sent. The states, not the people, were represented.

Soon after independence was secured in 1783, it quickly became clear that the union was in crisis. The state governments were exceedingly powerful while the national government was relatively weak. In May 1787, delegates gathered in Philadelphia, ostensibly to revise the Articles of Confederation. Almost immediately, however, Convention delegates agreed to scrap the Articles and proposed a radical new form of government for the nation. Designed to be in James Madison's words, "partly federal and partly national,"[2] the new system was designed to strengthen the powers of the central government while also preserving the power of the states. The system created three branches of government—the legislative, the executive, and the judiciary—that would check and balance one another.

Yet members at the Convention bitterly disagreed on how the executive branch should be constituted. Delegates differed on whether the executive should consist of a single individual, of multiple individuals, or of an executive council of some sort. Even before the thorny issues regarding the structure of the executive branch were resolved the Convention turned to the question of how the president should be elected. Delegates quickly rejected Virginia Plan's proposal that Congress should elect the president. They did not want the president to be a creature of Congress who would be beholden to the legislature and unable to operate independently of their control. Other delegates, bowing to the importance of the states as the basis of government, proposed that either the governors of states, or the state legislatures, should elect the president. This proposal also encountered resistance. Many delegates did not want to allow the states to possess so much power in choosing the president. In addition, they hoped that the president would come to be a unifying symbol for the country, linking

[2] James Madison, *Federalist* #39, in *The Federalist Essays*, https://avalon.law.yale.edu/18th_century/fed39.asp.

people throughout the nation. Devolving the election of the president to state governors or legislatures would magnify, not lessen, the power of the states and regions within the country.

Still another contingent, led by James Wilson of Pennsylvania, argued that the president should be elected—either directly or indirectly—by the people. In a republican government, according to Wilson and others, the people were the basis of government; they therefore should have a say in the election of the president. Yet this proposal, too, proved to be highly controversial. Certain political leaders feared the power of the masses. Some fretted that voters did not have enough education or information to choose the president. Others worried that the people would succumb to transient whims or violent passions when making their choice. Still others maintained that the people would be misled by the false promises or deluded by the flowery rhetoric of a demagogue. And yet others feared that the country would collapse into disorder, chaos, and mobocracy.

As finally codified in the Constitution, the Electoral College was to be a body established every four years specifically for the purpose of electing the president. It would have no existence prior to, or after, the presidential election. It was separate from, and independent of, all three branches of government. In the Electoral College, each state would receive the same number of votes as was equal to the number of its representatives in the House of Representatives, plus two. This meant states would cast ballots in the Electoral College roughly, though not precisely, in proportion to their represented population in Congress. For these purposes, "population" referred to all whites and three-fifths of all other inhabitants, including enslaved people but not including Indians. The structure of the Electoral College thus reinforced the inequitable three-fifths representation of enslaved people that had been embedded in the Convention's previous compromise over the nature of representation in Congress. With the passage of time, this decision also gave southern states, which possessed the vast majority of slaves, an increasing electoral advantage in electing both members of the House of Representatives as well as in the election of the president. Yet these were unintended consequences, not the motives, behind the structure of the Electoral College.

It is important to acknowledge that the debate over the Electoral College was not primarily a debate over slavery. The conflict primarily revolved around the relative power of the state legislatures, as opposed to the people, in choosing the president. If, for example, there were a tie in the Electoral College, the election would then be turned over to the House, where each state would receive one vote, no matter how many representatives the state elected. In addition, the Electoral College did not dissolve the boundaries between states or allow the people throughout the country to vote as a mass in electing the president. People voted within their states and chose presidential electors for their states, in a manner decided by their individual state legislatures.

The system thus acknowledged the importance of both the people and the states as the basis of the new government. Significantly, Article II, Section 1, Clause 2 of the US Constitution gave state legislatures the authority to decide whether presidential electors would be elected by all eligible voters or by the state legislators. During the first decades after the ratification of the Constitution, states experimented with different methods of electing the presidential electors. In the first presidential election in 1788, four of the participating states had their legislators choose the presidential electors. The other states allowed some form of popular participation in which eligible voters (usually white males) voted for electors. By 1824, a majority of states had shifted to the popular election of the presidential electors; only six of the twenty-four states still had their legislatures make the selection. By 1836, however, the transition to popular election of presidential electors was nearly complete. Only in South Carolina did the legislature continue to choose its presidential electors—and did so until the Civil War. In making this shift, states increasingly recognized the primacy of the people over the state governments in the business of electing their president.[3]

Contrary to what some scholars may argue (including scholars in this volume), the Electoral College was much less the result of a grand theory and much more an exercise in pragmatic politics.

[3] Alexander Keyssar, *Why Do We Still Have the Electoral College?* (Cambridge, MA: Harvard University Press, 2020), 32.

What was produced was a cumbersome, jerry-built structure that reflected negotiation, compromise, and old-fashioned horse-trading.[4] The question today is whether the Electoral College has outlived its usefulness. Over the course of almost 250 years, the power of the people has increasingly superseded the importance of the states in our understanding of popular democracy. Yet the original system for electing the president inscribed in the US Constitution remains basically intact. The divergence between the outcome of the popular vote and the Electoral College vote in the elections of 2000 and 2016 has brought to the fore the internal tensions contained within this system. Challenges to reforming the Electoral College are formidable. Yet as even James Madison admitted in 1788, the creation of the Electoral College had been but an "expedient"—one that should be retained only until "experience should point out one more eligible."[5] Perhaps the time for a new "expedient" has now come.

[4] The most compelling statement of this position can be found in: John P. Roche, "The Founding Fathers: A Reform Caucus in Action," *American Political Science Review* 55:4 (Dec. 1961), 799-816. See also, Shlomo Slonim, "The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President," *Journal of American History* 73:1 (June 1986), 35-58.

[5] James Madison in the Virginia Convention, June 20, 1788, in *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1937), III: 331.

II.5.

The Contingent Election: Adding Insult to Injury

Wilfred U. Codrington III

Over the course of nearly two and a half centuries, the Electoral College has come to represent glaring and entrenched structural inequality in our political system. Its origin story is impossible to tell without reference to America's original sin, as its design incentivized states to maintain and even expand the practice of slavery during the nation's first seventy-five years. (It rewarded Virginia, the largest slaveholding state, with four of the nation's five first presidents.)[1] Resisting postbellum efforts to disentangle it fully from the Constitution's gnarling slave roots, the Electoral College continued to have a disparate racial impact. For eight decades leading up to the passage of the Voting Rights Act, the system, in effect, augmented the weight of ballots cast by the white electorate in Jim Crow states that disenfranchised their Black population with abandon. Even today, the Electoral College privileges voters in small, disproportionately white states while, at the same time, operating to "waste" (or diminish the efficacy of) votes cast by members of concentrated minority communities throughout the country.[2] And of course, its most widely appreciated affront to political equality: there can be–and, indeed, have been–Electoral College "misfires,"

[1] John F. Kowal & Wilfred U. Codrington III, *The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union* (2021), 69-71; Wilfred Codrington III, "The Electoral College's Racist Origins," *The Atlantic* (Nov. 16, 2019); Paul Finkelman, "The Proslavery Origins of the Electoral College," 23 *Cardozo L. Rev.* 1145, 1146 n. 5 (2002).

[2] Luis Fuentes-Rohwer & Guy-Uriel Charles, "The Electoral College, the Right to Vote, and Our Federalism: A Comment on a Lasting Institution," 29 *Fla. St. U. L. Rev* 879, 907 (2001).

including "electoral inversions."[3] Twice in just this century, the popular and electoral vote count have diverged, resulting in the inauguration of a minoritarian president.[4]

Now add the contingent election, the Electoral College's fallback provision for when no candidate wins an outright majority of electoral votes cast. In such a scenario, the House of Representatives chooses the president from among the three-highest electoral vote-getters. It might seem fair that, when the country is undecided on the question, the elected members of the most democratic branch should select the person who will hold that national office of such singular importance to the U.S. constitutional and, indeed, world order. The tally that matters for the contingent presidential election, however, is not the sum total of individual members' votes, but those of each state delegation.[5] What this means is that California's 52-member House delegation, representing 39 million people, has the same voting power as the sole member representing Wyoming's 580,000 residents, fewer than those living in Memphis. The target of the contingent presidential election, then, is not the 160 million registered voters, nor is it even the 538 electors, but 26 delegations reflecting half of the states plus one.[6] Correspondingly, if no vice presidential candidate wins a majority of the electoral votes, the Senate makes the determination in its own contingent election. Voting individually, senators select one of the two leading running mates,[7] with a majority of that chamber's votes required for a contender to secure the office just "one heartbeat away" from the presidency.[8]

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[3] John M. Carey et al., "The Effect of Electoral Inversions on Democratic Legitimacy: Evidence from the United States," *British J. of Pol. Sci*. 52 (2022), 1891.

[4] Carol Anderson, *One Person, No Vote: How Voter Suppression is Destroying Our Democracy* (2018), 49, 86.

[5] U.S. Const. amend. XII.

[6] Importantly, while the Twenty-third Amendment made the way for the District of Columbia to cast electoral votes, the nation's capital—whose population is larger than that of two states—is not authorized to participate in the contingent election process. *See* U.S. Const. amend. XXIII.

[7] U.S. Const. amend. XII.

[8] *See generally* Birch Evans Bayh, *One Heartbeat Away: Presidential Disability and Succession* (1968).

The manner of choosing the president, according to Pennsylvania's James Wilson, the leading supporter at the 1787 Convention for a national popular vote, was "in truth the most difficult of all [subjects] on which we have had to decide." Significantly, however, as he and the remaining delegates lumbered over a period of months before finally agreeing to the Electoral College system as a compromise, they explicitly rejected proposals for an executive appointed by the legislature, a model that existed in the states. The reasons for this stemmed, in part, from concerns about equality, accountability, and fairness. Ultimately, however, considerations pertaining to the separation of powers are what led to the most vociferous objections. Empowering the legislature would pose the threat of an executive too dependent on Congress, Wilson argued, because the president would "be the mere creature of … that body." South Carolina delegate Pierce Butler feared that it would have the president corruptly governing with "the Legislature, where…cabal faction & violence would be sure to prevail." Notwithstanding their outspokenness about the hazards of legislative appointment, however, it became the defining feature of the Electoral College's fallback mechanism.

Still, the delegates were quite intentional about limiting the risks of the contingent election backstop. Alexander Hamilton proposed that the plan "let the highest number of ballots, whether a majority or not, appoint the President," which would reduce the incidence of contingent election scenarios. Having come to terms with the lack of support for a popular election for the president, Wilson offered some pragmatic democracy-enhancing adjustments to the plan. He advocated successfully for the decision to rest with the House of Representatives, not the Senate, and unsuccessfully—at least until the adoption of the Twelfth Amendment nearly two decades later—"to confine" the contingent election pool "to a smaller number than five of the Candidates." (James Madison, for his own part, was also "apprehensive" about empowering lawmakers to choose "out of the five highest candidates, [because] the attention of the electors would be turned too much to making candidates instead of giving their votes in order to a definitive choice.") In the end, however, it was Roger Sherman, famed for his

Connecticut Compromise, who suggested the most consequential change to be incorporated into the system. He argued that "if the Legislature were to have the eventual appointment instead of the Senate, it ought to vote in the case by States, in favor of the small States." Importantly, the modification to have the House vote collectively as state delegations instead of as individual members introduced greater opportunity for the disregard of the popular will while adding no appreciable safeguard against the potential for legislative creep into the executive sphere.

Though styled as a fail-safe mechanism, some at the Convention anticipated that the contingent election would end up becoming the principal means for choosing, predicting that leading candidates would frequently earn less than half of the electors' votes. In fact, this has occurred just three times in history, twice to select the president, and once more to determine the vice president. The first instance marked the culmination of the notorious election of 1800,[9] when Thomas Jefferson and Aaron Burr tied because the party electors failed to coordinate to cast a throwaway vote under the misguided original system that had presidential and vice presidential candidates appear on the same ballot.[10] While Jefferson ultimately went on to prevail, his victory was not secured before the House deadlocked in 35 rounds of balloting over the course of a week.[11] The experience exposed a design flaw in the larger system that invited not just deception and political gamesmanship, but the disastrous consequences of uncertainty in the young nation's leadership, prompting the swift adoption and ratification of the Twelfth Amendment.[12] In 1825, the contingent election process led to the

[9] Hamilton: An American Musical Soundtrack, The Election of 1800 (Atlantic Records 2015). *See Chiafalo v. Washington*, 591 U.S. 578, 583 (2020) ("Alexander Hamilton secured his place on the Broadway stage—but possibly in the cemetery too—by lobbying Federalists in the House to tip the election to Jefferson, whom he loathed but viewed as less of an existential threat to the Republic").

[10] U.S. Const. art. II, § 1, cl. 3.

[11] Jesse Wegman, *Let the People Pick the President: The Case for Abolishing the Electoral College* (2020), 88-92.

[12] Franita Tolson, "The 'Independent' State Legislature in Republican Theory," 10 *Tex. A&M L. Rev.* 549, 553, 572-73 (2023); John F. Kowal &

presidency of John Quincy Adams, who had been outperformed by Andrew Jackson in both the electoral and popular votes. (Importantly, not all states held a popular vote then, as some legislatures exercised their prerogative to appoint electors on their states' behalf.) Jackson supporters decried the "corrupt bargain" between Adams and then-Speaker of the House Henry Clay, who is claimed to have lent his support in exchange for the nomination to become Secretary of State in the Adams administration. And a contingent election was held yet again in 1836, this time to choose Martin Van Buren's vice president. Richard Johnson, Van Buren's running mate, was denied a win outright in the Electoral College when the party's electors from Virginia defected—spurning Johnson because of his relationship with Julia Chin, an enslaved woman of color—voting instead for William Smith, a slaveholder and former senator from South Carolina. The decision devolved on the Senate, which subsequently chose Johnson for the job as was the initial desire of the voters and the party.

Notwithstanding the infrequency of its occurrence historically, recent and ongoing changes in demographic trends combined with today's polarized voting behavior increases the likelihood of either a tie in the Electoral College or that no contender wins a simple majority (including due to a third-party "spoiler" candidate or defection by faithless electors). The electoral vote margin in several of the past elections has been uncomfortably close. In 2020 alone, had just 44,000 voters across three states changed their selection from Joe Biden to Donald Trump, the electors would have split 269-269.[13] Were the country to face this or a comparable scenario, Congress would proceed with the contingent election, a process that makes it theoretically possible that delegations from states representing less than 17 percent of the nation could break the tie. Given the political reality, it is more conceivable that the disparity would be narrower, but still lead to tragically minoritarian results. A presidential candidate earning a decisive popular vote

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Wilfred U. Codrington III, *The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union* (2021), 71-72.

[13] Benjamin Swasey & Connie Hanzhang Jin, "Narrow Wins in These Key States Powered Biden to the Presidency," NPR.org (Dec. 2, 2020).

win with upwards of 8 million more votes than the opposition may nevertheless lose because state lawmakers who owe their seats to egregious gerrymanders were likewise able to manipulate the lines for their state's congressional districts. Similarly, a Senate faction representing some 40 million fewer people than the remaining members of the chamber could decide that the vice presidency should be awarded to the far less popular of the two candidates. Worse still are the stark partisan implications of the voting that would transpire. More fixated on the minimizing opportunities for tyranny stemming from separation of powers violations—which have never been apt to materialize in the presidential election context—the delegates neglected the perils posed by the factions that Madison so distrusted. Indeed, the framers' disregard of the Electoral College's risks concerning the "separation of parties,"[14] combined with their open and visceral animosity towards the notion of political equality, led them to embed in the Constitution both incentives for lawmakers to engage in bitter partisan warfare and an unreasonably high chance of national rule by an acutely unrepresentative political minority.

In 1788, Patrick Henry—famed for his cry, "Give me liberty or give me death,"—made another provocative and memorable statement, this time during the Virginia Ratifying Convention. "Who authorized them to speak the language of, We, the people, instead of, We, the states?" the slaveholder and leading Anti-Federalist asked pointedly, referencing the drafters' choice for the Preamble's language. It was not "the people," he added, but the "States [that] are the characteristics and the soul of a confederation." The Electoral College is a constitutional relic that proves that the Anti-Federalists' undemocratic, states-oriented view won out—at least in the context of presidential selection. Its anachronistic design is a product of an aristocratic insistence on tamping

[14] *See generally* Daryl J. Levinson & Richard H. Pildes, "Separation of Parties, Not Powers," 119 *Harv. L. Rev.* 2311, 2313 (2006) ("Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties").

down majoritarian exuberance—"the excess of democracy," as Massachusetts delegate Elbridge Gerry called it—and the exaltation of a historically loaded conception of federalism. If the Electoral College can be characterized as a deeply ingrained and systemic historical offense to egalitarian ideals, its contingent election provision adds insult to injury. The Constitution's framers, in their lack of political foresight and showing a mere modicum of tolerance of (and sometimes an elitist disdain for) popular majorities, failed to grapple with the gross inequality that the Electoral College would foster. And the contingent election, quite possibly American constitutionalism's worst-case scenario for democracy, only further belies the notion "that here, We the People rule."[15]

[15] *Chiafalo v. Washington*, 591 U.S. 578, 597 (2020).

II.6.

"A bad edition of a Polish king": Thomas Jefferson and the Fear of Foreign Interference in U.S. Presidential Elections

Mark Stephen Jendrysik

In *Federalist* 39, James Madison called "Poland… a mixture of aristocracy and monarchy in their worst forms."[1] The political and military weakness of Poland in the 18th century stood as a warning to the Framers. In a letter to John Adams (November 13, 1787), Thomas Jefferson expressed his fear that under the new Constitution the American president would become "a bad edition of a Polish king." He believed that the office would evolve into a presidency for life. He said "when one or two generations shall have proved that this is an office for life, it becomes, on every occasion, worthy of intrigue, of bribery, of force, and even foreign interference. It would be of great consequence to France and England, to have America governed by a Galloman or Angloman."[2] In a letter to James Madison (December 20, 1787), he said "the election of a President of America some years hence will be much more interesting to certain nations of Europe than ever the election of a king of Poland was. Reflect on all the instances in history antient &

[1] James Madison, Federalist 39, in Alexander Hamilton, James Madison and John Jay, *The Federalist*. Cambridge: Cambridge University Press, 2003, p. 182.

[2] Thomas Jefferson, Letter to John Adams, November 13, 1787, in Thomas Jefferson, *Political Writings*. Cambridge: Cambridge University Press, 1999, pp. 359-360. I don't think Jefferson is saying that a Englishman or Frenchman would be elected president. He seems to be suggesting that the system of election and reelection under the original Constitution would produce presidents who might owe their elevation to office to foreign influence and support.

modern, of elective monarchies, and say if they do not give foundation for my fears." Jefferson expanded on this thought, saying, "if once elected, and at a second or third election outvoted by one or two votes, [the incumbent]… will pretend false votes, foul play, hold possession of the reins of government, be supported by the states voting for him, especially if they are the central ones lying in a compact body themselves & separating their opponents: and they will be aided by one nation of Europe."[3]

Why would Jefferson see the elected monarchy of Poland-Lithuania as a warning to the Framers of the United States Constitution? To understand his fears, it is necessary to look at the history and problems of elective monarchies. Historically, monarchies began as elective offices, but they quickly became hereditary. By the early modern period, the outstanding examples of elective monarchy in Europe were those of the Holy Roman Empire and the Polish-Lithuanian Commonwealth.[4] But by the time of Jefferson's letter, imperial elections in the Holy Roman Empire had become pro-forma exercises to select a member of the House of Habsburg.

While the monarchy of the Kingdom of Poland and the Grand Duchy of Lithuania had always been officially elective, from 1386 to 1548 the Jagiellonian dynasty had been able to establish the principle of hereditary succession. When the last male of that dynasty died in 1572, the nobility of the Commonwealth successfully enforced their right to elect the king. There followed an almost 200-year period (1573-1764) of the nobles choosing their ruler. All male members of the nobility had the right to attend the electoral assembly.[5] The nobility of the Commonwealth would as-

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[3] Jefferson to Madison, December 20, 1787. Thomas Jefferson, Letter to James Madison, December 20, 1787, in Thomas Jefferson, *Political Writings*. Cambridge: Cambridge University Press, 1999, pp. 361-362.

[4] In Polish, *Rzeczpospolita*. The true political nature of the Commonwealth was best summed up by Thomas Paine when he said, "Poland calls itself a republic, but it is in fact an hereditary aristocracy, with what is called an elective monarchy." *Rights of Man, Part II*, in *Thomas Paine: Political Writings.* Cambridge: Cambrige University Press, 2000, p. 178.

[5] In Polish, *szlactha*. Nobility in the Commonwealth differed from other nations in that all nobles were legally equal. Of course, a few dozen great

semble in thousands in a field, usually outside Warsaw, and attempt to reach agreement on a candidate. They did not always succeed. Two civil wars arose from disputed elections—one of which, the War of Polish Succession (1733-35), evolved into a European war involving all the great powers.

In the ten elections, the electors chose four Poles, two Germans, three Swedes, one Hungarian, and one Frenchman.[6] The elected kings generally tried and failed to establish hereditary succession.[7] Unsurprisingly, the nobility preferred to choose foreigners who would be dependent their support. These foreign kings could not resist the demands of the nobility since they had no resources in the kingdom. They also had interests in other countries that distracted them from the internal problems of the state. The elected kings' foreign attachments also embroiled the Commonwealth in conflict. For example, the three Swedish kings were part of a deposed branch of the Vasa dynasty. Their continual efforts to regain the Swedish crown produced decades of war and invasion by Swedish armies. The two German kings, who were also Electors of Saxony in the Holy Roman Empire, gave little attention to the Commonwealth. They allowed the nobility to govern (badly) and relied on Russian troops to maintain their position. The second Saxon king Augustus III (reigned 1733-1763) spent less than three years of his reign in Poland.[8]

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families, known as Magnates, exercised greater influence than the thousands of often poor members of the *szlactha*.

[6] In June of 1754, the first elected king, the Frenchman Henry of Valois, fled the country after a reign of 118 days to become king Henry III of France. Davies, pp. 417-418.

[7] In contrast, the French kings of the Capetian dynasty managed to establish hereditary succession soon after the election of Hugh Capet in 987 CE. They were also lucky as they produced direct male heirs for centuries. Louis-Philippe I (deposed 1848), the last king of France, was a direct male line descendent of Hugh Capet. The Capetians were also able to expand their personal holdings in France, making the king financially independent.

[8] Norman Davies, *God's Playground: A History of Poland*. Volume 1. New York: Columbia University Press, 1982, Chapters 10, 12-18.

Later elections were characterized by rampant corruption, threats and the use of force to coerce electors, and rival candidates. Foreign states, particularly Russia, allied with factions of nobles to advance weak candidates. Murderous violence characterized many electoral assemblies. "In 1764, when only thirteen electors were killed, it was said that the Election was unusually quiet."[9] By the time of the last election in 1764, Russian troops were deployed within sight of the electoral assembly and an estimated 2.5 million rubles were paid in bribes to the electors. While a Pole was elected, he was by all accounts a creature (and former lover) of Catherine II of Russia.[10]

To be fair, the elective monarchy was only one factor in the decline of the Commonwealth. By the mid-seventeenth century, legislation in the national parliament (Sejm) had become effectively impossible. The belief that all noblemen were equal, and thus all decisions should be unanimous, led to the evolution of the so-called *Liberum veto*.[11] This was the ability of a single member of the assembly to veto legislation. In time, meetings of the Sejm were characterized by the failure to pass any legislation at all. In the 150 Sejms between 1573 and 1763, fifty-three failed to pass legislation. During the thirty-year reign of Augustus III, only one Sejm was able to pass any legislation at all. The "golden freedom" of the Polish-Lithuanian nobility prevented the state from functioning in any meaningful way and led to conditions of anarchy.[12] Liberum veto was abolished in the Constitution of May 3, 1791. The Constitution also abolished the elective monarchy, establishing hereditary monarchy under (ironically) the ruling dynasty of Saxony. The Constitution never went into full effect as the Commonwealth was extinguished as an independent state by the Partitions of 1795.

Jefferson's fears about foreign influence in presidential elections were quite reasonable. The small number of presiden-

[9] Davies, p. 332.

[10] Richard Butterwick, *Poland's Last King and English Culture: Stanisław August Poniatowski, 1732–1798*. Clarendon Press, 1998.

[11] Consider the role of the filibuster and unanimous consent rules in producing a similar effect in the contemporary United States Senate.

[12] Davies, Chapter 10.

tial electors and the dangers of establishing a presidency for life seemed to invite foreign meddling. When we consider efforts by foreign states to influence recent presidential elections, it seems clear that the Electoral College, which has led to only a handful of states mattering in presidential elections, is ripe for corrupt influence.[13] The willingness of certain politicians to invite and accept foreign campaign contributions, foreign hacking of political opponents, and disinformation from foreign troll farms on social media suggest that Jefferson was prescient.

[13] See Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Senate Intelligence Committee, 2017, 2020. https://www.intelligence.senate.gov/publications/report-select-committee-intelligence-united-states-senate-russian-active-measures.

II.7.

Anti-Federalist Criticisms of Presidential Selection: Have They Been Validated by Practice?[1]

Michael T. Rogers

> The Executive [selection process] is still worse in this respect than the Democratic branch. He is to be elected by a number of Electors in the country [i.e., the Electoral College]; but the principle is changed when no person has the majority of the whole number of electors appointed, or when more than one have such a majority, and have an equal number of votes, for then the Lower House is to vote by States. It is thus changing throughout the whole. ***It seems rather founded on accident, than any principle of Government I have ever heard of.***
>
> William Grayson, Virginia Ratification Convention[2]

In previous research on presidential selection, I corrected the historical record by showing that the Anti-Federalists extensively criticized presidential selection and the Electoral College (EC). Their criticisms had gone unnoticed for too long because those

[1] The research presented here on the Anti-Federalists was supported by the National Endowment for the Humanities: Democracy demands wisdom summer grant. I also want to thank and acknowledge the invaluable work of my research assistant, Alexandria (Cisco) Avery, whose assistantship was funded through an Arkansas Department of Higher Education's Student Undergraduate Research Fellowship grant.

[2] DHRC X, No. 3, 1373. To simplify citations, Michael Faber's approach is used. (CAF) is used for *The Complete Anti-Federalist* and (DHRC) for *The Documentary History of the Ratification of the Constitution*; see Faber, Michael J. *An Anti-Federalist Constitution: The Development of Dissent in the Ratification Debates*. Lawrence, KS: University Press of Kansas, 2019. xii.

who defended the EC—the Federalists—controlled the narrative at the time of ratification and claimed the opposition—the Anti-Federalists—had virtually no concerns with it. The Federalists were not only successful at promoting this narrative during the ratification debates, but the false narrative became reproduced by Founding scholars for much of United States history.[3] Having uncovered the Anti-Federalists' view of presidential selection and the EC, the investigation here is to assess which of their criticisms have been substantiated by the fifty-nine times the EC has been used over its 230 years of existence.[4]

Philosophical Comments

Before exploring the historical validation of Anti-Federalist criticisms, some philosophical issues need to be addressed. Foremost, this research is motivated by continuing the efforts of Anti-Federalist scholars like Main, Storing, Cornell, Siemers, and Faber over the last three-quarters of a century. They have revived the Anti-Federalist voice from historical obscurity and enhanced the understanding of Anti-Federalist political thought.[5] Analyzing An-

[3] Rogers, Michael T. "A Mere Deception—A Mere Ignus Fautus on the People of America: Lifting the Veil on the Electoral College," in *Electoral College Reform, 1st Edition*, edited by Bugh, Gary, 19–42. London and New York: Routledge, 2016.

[4] National Archives. "Electoral College Results." Accessed 05/21/2024. https://www.archives.gov/electoral-college/results.

[5] Main, Jackson Turner. *The Antifederalists: Critics of the Constitution 1781-1788*. Chapel Hill, NC: The University of North Carolina Press, 1961; Storing, Herbert J. and Murray Dry, eds., *The Complete Anti-Federalist: What the Anti-Federalists Were For*. Vol. 1-7. Chicago: University of Chicago Press, 1981; Cornell, Saul. *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*. Chapel Hill, NC: University of North Carolina Press, 1999; Siemers, David J. *Anti-Federalists: Men of Great Faith and Forbearance*. Lanham, Maryland: Rowman & Littlefield Publishers, 2003; Siemers, David J. "Publius and the Anti-Federalists: "A Satisfactory Answer to all the Objections?" in *The Cambridge Companion to the Federalist*, edited by Rakove, Jack N. and Colleen A. Sheehan, 18–51. New York, NY: Cambridge University Press, 2020; and Faber, Michael J. *An Anti-Federalist Constitution: The Development of Dissent in the Ratification Debates*. Lawrence, KS: University Press of Kansas, 2019.

ti-Federalist criticisms of the Electoral College further enhances this understanding of Anti-Federalist political thought.

Next, by asking if Anti-Federalists criticisms of the EC have been validated historically, this work may appear foundationalist in nature.[6] That is not the intention. It is not the goal to say the Anti-Federalists were political foundationalists, or more foundational than the Federalists, any more than it is to pigeonhole the Anti-Federalists (or Federalists) as embracing any particular ideology—Lockean (neo)liberalism, classical republicanism, or Beardian progressivism.[7] This research adopts Alan Gibson's multiple traditions approach in interpreting founding documents. As he explains, "any effort to interpret the political thought of the Founding as a reflection of a single tradition ran headlong" into a mass of conflicting scholarship and that such ideological labels over "simplify complex patterns of thought." Using Gibson's multiple traditions orientation, the Founders—Federalists and Anti-Federalists alike—drew on the variety of intellectual influences existent at the time to produce "novel conceptions of political thought in the face of eighteenth-century American experience."[8]

Such novel conceptions chosen by relevance to the Founders' experiences inherently leads not only to internal contradictions for a singular tradition, but lead both groups to have members who contradict each other. For example, among the Anti-Federalists one discovers some calling for direct popular election of the president and a closer relationship between the office and the people,[9] while others like John Stephens, Jr. (a.k.a. *A Farmer of New Jersey*), Patrick Henry, and the *Spurious Martin Luther* (who as "spurious" may have just been facetious) feared the opposite—that the presi-

[6] Gibson, Alan. *Understanding the Founding: The Crucial Questions*. Second Edition. Lawrence, Kansas: University Press of Kansas, 2010, 240-243.

[7] Gibson, Alan. *Interpreting the Founding: Guide to the Enduring Debates Over the Origins and Foundations of the American Republic*. Second Edition. Lawrence, Kansas: University Press of Kansas, 2009; and Gibson, Alan. *Understanding the Founding: The Crucial Questions*. Second Edition. Lawrence, Kansas: University Press of Kansas, 2010.

[8] Gibson 2010, 53.

[9] Rogers 2010, 35-38.

dent would be too dependent on the people.[10] Such contradictions appear more frequently in the Anti-Federalist than Federalist writings, but they occur in both.

Likewise, Gibson validates the value of this investigation into how Founding political thought has relevancy beyond the Founding era. The goal is not to suggest that the Anti-Federalists were prophetic soothsayers, predicting the electoral crises and other controversial outcomes of the EC. Instead, "historically sound interpretations of the American Founding can establish the direct contemporary relevance of some of the Founders' ideas and enrich our contemporary political life" in three ways. One is to "present us with competing interpretations of some of the foundational concepts in American politics" in ways that "inform our own political thinking and vocabulary"; secondly, "[w]e can also reason with the Founders about some of our most enduring problems"; and third, studying "the thought of the Founders may provide opportunities to appropriate their ideas for present political purposes."[11] Gibson's second point—the hope to reason with the Founders on our enduring problems—is the primary motivation here. Yet that does not preclude this exercise from enhancing our understanding of foundational concepts in American politics or that their arguments cannot be appropriated to inform our current political purposes. All in all, analysis of Anti-Federalist political thought helps balance the historical scales and puts the Anti-Federalists on equal footing with the Federalists as astute political thinkers who drew differently on multiple traditions of political thought, connecting it to political history and their experiences in original and equally valuable ways to the Federalists.

[10] DHRC XIX, 182, 184; DHRC IX, 1061-1062; DHRC XVII, 71-73.
[11] Gibson 2010, 130-132.

Have Anti-Federalist Criticisms of the EC Been Validated by Practice?

As an overview, Anti-Federalists feared the form of government and type of leadership the electoral process would produce (i.e., an elective king, which was worse than a hereditary one by their estimation, or even despotism); that the process violated the principles of democratic government (i.e., that the EC was overly complex, that it did not tie the presidency close enough to the people, and that there was not direct popular election of the office); and that domestic and foreign election intrigue would ensue.[12] Continued research has revealed that the Anti-Federalists had differing views on whether the EC would favor the large or small states. Not surprisingly, those from large states thought it favored small states and those from small states thought the reverse.

Concern about the Form of Government and Type of Leader

Among Anti-Federalist concerns about presidential selection and the EC, the most common was that it would produce an elective kingship, with a few even fearing it would devolve into despotism. More than a dozen Anti-Federalists across most states (only Delaware has no recorded criticisms of the EC) vocalized such concerns.[13] Such criticisms were partially a facet of the endless re-eligibility for the presidency (at least until the passage of the 22nd Amendment in the mid-twentieth century), but the election process was a contributing factor as well. The Anti-Federalists cited the many problems plaguing elections of monarchs in Europe, citing the examples of Poland and Sweden.[14] Then, a few Anti-Federalists turned to the precedent of the Roman Republic, noting how Roman Consuls gave way to dictators. *Centinel* noted executive selection did not prevent the likes of Augustus, as well as Tiberius, Nero, and Caligula, from consolidating power and ruling

[12] Rogers 2010, 33-42.
[13] Rogers 2010, 34-35; see particularly Table 2.4.
[14] DHRC VIII, 251; DHRC X, 1373-1374; DHRC XIV No. 2, 464, 489; and CAF 3, 37-38

despotically.[15] Anti-Federalists questioned what was to stop a charismatic leader or one backed by the military from securing his or her own elective monarchy through the EC.[16]

Fortunately, despotism has never materialized in the United States. However, FDR's presidency is some validation of Anti-Federalists' concerns for an elective monarchy.[17] Americans, particularly Republicans, worked to prevent a second elective monarchy during FDR's third term by adopting the 22nd Amendment. Interestingly, *A Farmer & a Planter* proposed the president would become a king and his son would follow him in office.[18] While this has never happened as described, family legacies span the history of the EC. Almost 18% of the time relatives have risen to the presidency (Adams, Harrisons, Roosevelts, and Bushes). The Roosevelts were just distant cousins and the Harrisons were uncle and nephew, but the Adams and Bushes were father and son. Still, none of these reflect a hereditary monarchy; no father has passed the office on immediately to his offspring.

As one final observation on leadership, the Anti-Federalist fear that the military would get their man seems most applicable to only the first president, George Washington. Numerous (31/45) presidents have had military service.[19] Yet the EC has only occasionally favored military leaders, typically generals, whose military backgrounds factored prominently in propelling them to the presidency. Andrew Jackson, Ulysses Grant, Teddy Roosevelt, and Dwight Eisenhower come to mind, representing about 8% of all presidents.

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[15] DHRC II, 169-170; see also CAF 5, 139-141.
[16] DHRC XXVIII, 17
[17] Rogers 2010, 35.
[18] CAF 5, 76-77
[19] O'Brien, Caitlin. "31 Presidents Who Served in the Military." *Militarytimes.com*, Feb 15, 2021. https://www.militarytimes.com/news/your-military/2021/02/15/31-presidents-who-served-in-the-military/.

The EC Violates Principles of Democracy

Too Complex and Complicated

Scholars have established that a central feature of Anti-Federalist political thought is the belief in simple, local-oriented democratic government.[20] Given this democratic orientation, more than a dozen Anti-Federalists across four states faulted the EC and presidential selection for its complexity, including a future president—Monroe, as well as George Mason, *Republicus*, and *Cato*.[21] As *Republicus* noted, the EC was quite "[a]n extraordinary refinement...on the plain simple business of election."[22] When one makes elections complicated, it undermines democratic government on multiple levels, for it becomes unclear who ultimately elects the president (the people, the state, or EC voters) and, as a result, who is ultimately sovereign.

Evaluating this concern historically is complicated, but a few points can be made. Foremost, the vast literature (of which this edited volume is a member) on explaining how the Electoral College works and evaluating it points to the complexity of the process and how it confounds Americans. Then, anecdotally, there is my experience of having taught American government for over twenty years in multiple colleges and universities in the Northeast, Midwest, and South. Students have struggled to understand the EC and presidential selection process: a number (not over half) incorrectly mark a standard multiple-choice question asking who elects the president by answering that the people, and not the EC, do. For those desiring more empirical evidence, a recent civic literacy study found less than half (40%) of Americans know that if there is no majority winner of the EC the House determines the winner.[23]

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[20] CAF 1, 53-63; see also Duncan, Christopher M. "Men of a Different Faith: The Anti-Federalist Ideal in Early American Political Thought," *Polity* 23, no. 6 (Spring, 1994): 387–415.

[21] Rogers 2010, 30-32; see particularly Table 2.2.

[22] DHRC VIII No. 1, 448; CAF 5, 168.

[23] Borelli, Gabriel and Shanay Garcia. "What Americans Know about their Government," Pewresearch.org. Pew Research Center, November 7, 2023.

It is likely even fewer Americans would know this vote requires House members to vote in block by state. The Framers succeeded in making the process "highly complicated."[24]

The President Is Too Distant from the People

For the Anti-Federalists, the EC and fail-safe House clause combined to undermine the simple business of democratic government and popular sovereignty. How is a close tie to the people maintained with a multi-step election process that has state legislatures (post-ratification for most states) or the people vote, then state EC voters vote, and then possibly the House vote in state blocks? Almost a dozen Anti-Federalists from at least four different states did not believe this secured a close tie of the presidency to the people.[25]

Certainly, presidential claims of having a popular mandate upon winning confounds this criticism. Yet a concern for popular sovereignty and more closely tying the people to the president through the EC is a factor in the popular National Popular Vote Movement.[26] Furthermore, Keyssar establishes that the idea of a national popular vote was introduced as early as 1816, though it would not become a focus of reform efforts until much later in the back half of the twentieth century.[27]

Tied to their concern that the president was left too distant from the people by the EC process, *Cato*, Monroe, and Mason were also troubled by the contingency House election, particularly the House's ability to choose among the top-five EC vote-getters. Mason, in particular, worried that as long as the House choice in the fail-safe election is "extended to the five highest, a person having a

[24] Mayer, William G. "What the Founders Intended: Another Look at the Origins of the American Presidential Selection Process," in *The Making of the Presidential Candidates 2008*, edited by Mayer, William G., 203–234. Lanham, MD: Rowman & Littlefield Publishers, Inc., 2008.

[25] Rogers 2010, 33-34; particularly Table 2.3.

[26] The National Popular Vote. "Agreement among the States to Elect the President by National Popular Vote." Accessed 6/24/2024. https://www.nationalpopularvote.com/written-explanation.

[27] Keyssar, Alexander. *Why Do We Still Have the Electoral College?* Cambridge, Massachusetts: Harvard University Press, 2020, 5, 206-262.

very small number of votes may be elected."[28] Alternatively, writing James Madison, McClurg noted, "Some have objected also to the Influence of the Presidt in the house of representatives as capable of producing his reelection, even when the majority of ye constitutional electors are against him."[29]

Although the Anti-Federalist focus on the House fail-safe is a bit misplaced (only twice or 3.3% of the time has it been needed), their speculations concerning minoritarianism were well made. They deduced it was possible to win office with simply a plurality of votes, whether popular or EC votes (the latter of which was more their focus). In fact, there have been fourteen elections (1844, 1848, 1856, 1860, 1880, 1884, 1892, 1912, 1916, 1948, 1960, 1968, 1992, and 1996)—almost a quarter of all EC elections—where the winner of the presidency achieved office with only a plurality of popular votes.[30] Then, for one of those two occurrences of the House fail-safe vote, Mason, *Cato*, and Monroe, were correct. In the election of 1824, Jackson was the people's choice, winning the popular vote and the most EC votes (but not a majority of the latter). In the House, J. Q. Adams was the preferred candidate and was given office by the political maneuvering of Henry Clay in what is commonly known as the "corrupt bargain."[31] Both House fail-safe elections (1800 and 1824) left the presidential selection process mired in controversy and the country greatly divided.[32] The 1800 election, in which Jefferson and his vice presidential candidate Burr tied in EC votes, necessitated the 12th Amendment (passed in 1804) to fix. This amendment also addressed and alleviated some of the Anti-Federalist concern about the House fail-safe election, as it reduced the House choice to the top-three EC vote-getters.

[28] For Mason DHRC X No. 3, 1375-1376; for *Cato* DHRC XIX No. 1, 197; CAF 2, 115; and for Monroe DHRC X No. 3, 1371-1372.

[29] DHRC VIII No. 1, 251.

[30] National Archives. "Electoral College Results." Accessed 05/21/2024. https://www.archives.gov/electoral-college/results.

[31] Boller Jr., Paul F. *Presidential Campaigns: From George Washington to George W. Bush*. New York: Oxford University Press, 2004, 35-37.

[32] United States House of Representatives. "Electoral College & Indecisive Elections." Accessed 05/21/2022. https://history.house.gov/Institution/Origins-Development/Electoral-College/.

Yet to this day a candidate who wins a majority of the popular vote but not of the EC vote, *or* a candidate wins the most EC state votes but does not achieve the 270 threshold for a majority of them can lose the presidency, particularly if the House chooses.

Direct Popular Election

Half a dozen Framers at the Constitutional Convention, including Franklin and Madison, as well as a number of Anti-Federalists, during the ratification debates favored direct popular election of the president.[33] The nine Anti-Federalists across six states calling for direct popular election are presented in Table 1.1 below.[34]

Table 1.1: Anti-Federalists Advocating Direct Popular Election

Anti-Federalist	Source	Tally
CT- *An Old Soldier*	DHRC XV, 258; Faber 2019, 419	**9**
MA- M. Warren	DHRC VII, No.4, 1720; CAF 4, 274	**(10)**
MD-S. Chase	DHRC XII, 639; CAF 5, 87; Faber 212	
NY- *Cato*	DHRC XIX, No. 1, 197; CAF 2, 115	
A Tenant	DHRC XX, No. 2, 967	
35 Anti-Federalist Objections	DHRC XXI, No. 3, 1393-1394	
PA- *An Old Constitutionalist*	DHRC II, Microform Suppl., 858-859	
	DHRC X, No. 3, 1373	
VA- J. Monroe	DHRC VIII, No. 1, 425	
J. Spencer	DHRC VIII, No. 1, 448; CAF 5, 168	
Republicus		

[33] Rogers 2010, 24-25, 37.

[34] An additional count is put in grey for the "35 Anti-Federalist Objections" as this is reported second-hand through Federalists (the Albany Federal Committee, see DHRC XXI No. 3, 1393-1394). Unfortunately, the actual Anti-Federalist record is not available for verification and inclusion in the official tally.

Today, many agree with the Anti-Federalists and lament that the majority preference is not guaranteed by the presidential selection process, as is evident by the eighteen jurisdictions representing 209 EC votes that have joined the movement to tie their EC votes to national popular vote.[35] Historically, only five elections have occurred where the majority winner of the popular vote lost.[36] As Edward Foley—the authority on how presidential selection is intended to respect majority rule or at least a "compound majority" of states' rule—writes, "Fortunately, it [the EC] has not often produced presidents in contravention of majority rule."[37] While this is true, the EC still can result in a president who did not win the national popular vote. This EC outcome seemed a relic of the nineteenth century, where it happened three times (1824, 1876, and 1888). There were no occurrences in the twentieth century. However, this outcome has resurfaced with a vengeance in the current century, having occurred twice (2000 and 2016) in the last six elections.[38] A president who wins the EC but not the popular vote nationally has happened more often (five of fifty-nine elections or 8.5% of the time) than no candidate getting a majority of EC votes resulting in the House choosng (two of fifty-nine times, or 3.3%).[39]

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[35] The National Popular Vote. "Agreement among the States to Elect the President by National Popular Vote." Accessed 6/24/2024. https://www.nationalpopularvote.com/.

[36] Roos, Dave. "5 Presidents Who Lost the Popular Vote but Won the Election." *History.com*, July 12, 2024. https://www.history.com/news/presidents-electoral-college-popular-vote.

[37] Foley, Edward B. *Presidential Elections and Majority Rule: The Rise, Demise, and Potential Restoration of the Jeffersonian Electoral College*. New York, NY: Oxford University Press, 2020, 1.

[38] Keyssar, Alexander. *Why Do We Still Have the Electoral College?* Cambridge, Massachusetts: Harvard University Press, 2020, 1.

[39] National Archives. "Electoral College Results." Accessed 05/21/2024. https://www.archives.gov/electoral-college/results.

Concerned about Foreign and/or Domestic Election Intrigue

Analyzing the Constitutional Convention, Mayer claims one of the main concerns of participants was to guard against cabal, intrigue, and corruption.[40] Hence, the Framers came up with the multi-step election process that uses a temporary body that only comes together once every four years and uses representatives scattered across the states. Despite all this complexity, the Anti-Federalists were not convinced. A dozen Anti-Federalists across almost half the states posited that foreign and/or domestic election tampering would occur.[41] For brevity, only their domestic criticisms are explored. They feared the president would be the choice and puppet of Congress, that a sitting president would tamper to ensure reelection, and that there would be collusion—in today's terms—faithless electors, that would collude and affect the choice of president.

Puppet of Congress

The institution that worried Anti-Federalists the most was Congress. For one example, the authors of "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents" wrote, "The mode of electing the president is another excellent regulation, most wisely calculated to render him the obsequious machine of Congress."[42] These fears of Congress were particularly driven by the House fail-safe mechanism for when no candidate wins a majority of the EC votes. However, in the nineteenth century nothing as grand as the House contingency election was needed for Congress to influence presidential elections. During the Era of Good Feelings, Congress dictated presidential selection. With the rapid onset of political parties, King Caucus (the dominant party in Congress) named and nominated their candidate, who was crowned multiple times (Jefferson, Madison, then Monroe).

Post-King Caucus and the two House contingency elections, Congress has not played a central role except for the infamous

[40] Mayer 2008, 216-218.
[41] Rogers 2010, 35-37, see particularly Table 2.5.
[42] CAF 3, 196.

1876 election. Tilden likely beat Hayes in 1876, but the Constitution's failure to address how to handle disputed state EC votes resulted in a divided Congress (the House was Democratic and the Senate was Republican). In response, Congress formed an *ad hoc* bipartisan Electoral Commission to decide the twenty disputed EC votes of Oregon, South Carolina, Louisiana, and Florida. Rutherford B. Hayes needed all twenty to win but probably only won Oregon. Tilden should have been president, but the Electoral Commission awarded all four states to "*Rutherfraud* Hayes," "the *Fraudulent* President," in exchange for a policy of leniency on the South in the Compromise of 1877.[43] Regardless, Congress having undue weight in choosing a president has been an artifact of the 1800s.

Sitting Presidents Manipulating Their Own Reelection

Alternatively, some Anti-Federalists speculated that sitting presidents would interfere to secure their own reelection. *Republicus* and Jefferson raised such fears.[44] Two major events come to mind when evaluating this fear—Richard Nixon, the Committee to Re-Elect the President (CREEP), and the Watergate scandal in the 1970s, as well as Donald Trump's recruitment of fake electors from seven battleground states to submit faulty EC ballots in 2020.[45] Compare Trump's actions in 2020 to what Jefferson offered in a letter from his diplomatic post in France:

[43] Boller Jr. 2004, 134-137; italics added to original text for emphasis.
[44] DHRC VIII No. 1, 449; CAF 5, 168-169; DHRC XIV No. 2, 489.
[45] Amiri, Farnoush. "How the Trump Fake Electors Scheme Became a 'Corrupt Plan,' According to the Indictment." *Associated Press*, Dec. 18, 2023. https://apnews.com/article/donald-trump-jan-6-investigation-fake-electors-608932d4771f6e2e3c5efb3fdcd8fcce.

> Reason & Experience tell us that the First magistrate will always be re-elected if he may be re-elected. He is then an officer for life.…If once elected, and at a 2d. or 3d. election outvoted by one or two votes, he will pretend false votes, foul play, hold possession of the reins of government, be supported by the states voting for him, especially if they be the central ones, lying in a compact body of themselves & separating their opponents.[46]

Faithless Electors

A couple Anti-Federalists—*The Federal Farmer* and Mercy Otis Warren—thought collusion would occur within the EC itself.[47] Historically, there have been occasional attempts to promote faithless electors, encouraging EC voters to manipulate the choice of president through their collusion. This has occurred at times historically. Most recently, in 2016, Democrats tried to convince Republican EC voters to be faithless and prevent a Trump victory. Ironically, more (five) defected from Clinton than Trump (two). Still, 2016 was the highest number of faithless voters (seven) in the history of the EC, exceeding the previous record of six in the 1808 election of James Madison.[48] Fortunately, while concern over faithless electors dates back to at least the presidency of Andrew Jackson, such behavior has yet to change the outcome of any presidential election.[49] More importantly, the likelihood faithless

[46] DHRC XIV No. 2, 489.

[47] DHRC XXI No. 3, 1037 or CAF 2, 310; DHRC XVI, 281 or CAF 4, 278.

[48] Boccagno, Julia. "Which Candidates did the Seven "'Faithless' Electors Support?" *CBSnews.com*, Dec. 21, 2016. https://www.cbsnews.com/news/which-candidates-did-the-seven-faithless-electors-support-election-2016/.; Agrawal, Nina. "All the Times in U.S. History that Members of the Electoral College Voted their Own Way." *Los Angeles Times*, Dec. 8, 2016. https://www.latimes.com/nation/la-na-faithless-electors-2016-story.html.

[49] Alexander, Robert M. "Lobbying the Electoral College: The Potential for Chaos," in *Electoral College Reform*, *1st Edition*, edited by Gary Bugh, 159–174. London and New York: Routledge, 2016; Keyssar 2020, 2.

electors could change a presidential election in the future is declining, as twenty-nine states and D.C. bind their EC voters to the vote of their state.[50]

Does Presidential Selection Favor Small or Large States?

Favor Small or Large States?

Although convention delegates tried to balance the interests of large and small states, many Anti-Federalists remained unsatisfied. For example, *Cornelius* and Grayson came away fearing the EC would just fuel state (or regional) factionalism.[51] Evaluating this fear is beyond this work, but what can be tested is the fear of Landes of South Carolina and *John DeWitt* from Massachusetts. Both, the former from a small population state and the latter from a large one, lamented their home state would be unlikely to produce a president.[52] There have been forty-five presidents by which to test if the EC favors large or small state candidates for president. In Figure 1 (data available in Appendix A, Table A.1), there are two maps. One examines the birth state and the other the primary residency of a president when assuming office. Graphically, large population states have more often been the birthplace, as well as the primary residency, of presidents. Over half (twenty-four) of the states have never had one of their own as president. In particular, smaller population states of the West are conspicuously missing from the map, not represented at all. Then, much of the South is also missing. This affirms the fears of those Anti-Federalists who anticipated a bias for large population states.

In fact, 70% or seven of the first ten presidents (1787-1845) were from the largest population state of Virginia (five) or the second-largest of Massachusetts (two). Among the forty-five pres-

[50] Agrawal, Nina. "All the Times in U.S. History that Members of the Electoral College Voted their Own Way." *Los Angeles Times*, Dec. 8, 2016. https://www.latimes.com/nation/la-na-faithless-electors-2016-story.html.

[51] DHRC IV No. 1, 415 or CAF 4, 143-144; DHRC X No. 3, 1374-1375.

[52] DHRC XXVII, 126; DHRC IV No. 1, 159.

idents, the top-four president-producing states (Virginia, Ohio, New York, and Massachusetts) are higher population states. Of the four, currently Massachusetts is the lowest-ranking by population at sixteenth while New York is highest at fourth. These four higher-population states have been the birthplace of over half (twenty-four) and the primary residency of slightly less than half (twenty-two) presidents. Of the seven most-populous states today (CA, TX, FL, NY, PA, IL, and OH), only Florida has not birthed or had a primary resident become president. Then, of the ten least-populated states today, only two lay claims to presidents. Vermont has two by birth (Chester Arthur and Calvin Coolidge) and Delaware one by residency (Joe Biden).[53]

Contrary to Landes's fear, South Carolina does claim one president—Andrew Jackson—by birth (not primary residency). *John DeWitt* was wrong about Massachusetts, as it has produced 9% (four by birth and four as primary residency) of all presidents to date. It should not be surprising that the only office that represents the entire United States has a selection process that favors candidates birthed or having primary residency in large states. Large states provide a strong platform to move from a state identity supportive of election to a national one supportive of winning the presidency.

Discussion

While Anti-Federalist fears of elective kingship and, worse, despotism have not ensued through the EC, their criticism that the process is an exceptional complication of the simple business of elections and popular democratic government remain true. Many Americans seem to agree today, given recent survey results showing Americans favor replacing the EC with majority popular vote to choose the presidency.[54] Then, history shows even the convolut-

[53] World Population Review. "US States-Ranked by Population 2024." Accessed 8/28/2024. https://worldpopulationreview.com/states.

[54] Kiley, Jocelyn. "Majority of Americans Continue to Favor Moving Away from Electoral College." Sept. 25, 2023. https://www.pewresearch.org/short-reads/2023/09/25/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/.

ed, multi-step presidential selection process cannot escape election intrigue. Still, it has done well in preventing such actions from affecting, in the end, the choice of president. While Anti-Federalists split on whether the process favored small or large states, the historical record shows around half of all presidents are born and claim residency of a large state. While mathematically EC voters do amplify the voice of small states in selecting presidents, they seem to more often choose a candidate from a large state. All in all, one finds several Anti-Federalist criticisms are validated by historical practice (e.g., a winner who did not have the majority vote or elections where Congress has undue say and influence) and that some arguments echo in contemporary criticisms (e.g., the president is not popularly elected and fear of collusion among faithless electors).

As a final point, one might be interested in how the Anti-Federalists would have had presidents chosen. Foremost, as explained, many desired direct popular election of the president. Additionally, if the EC process was to be kept, the *Society of Western Gentlemen* felt the House fail-safe election mechanism should be changed from each group of state representatives voting in block to allowing each House member to vote individually.[55] Yet the most intriguing recommendation was by *Agrippa* in Massachusetts and Benjamin Palmer in New York. Both recommended using the Ancient Greek by lot mechanism to ensure every state would have its turn with its representative occupying the presidency. In the *Massachusetts Gazette*, *Agrippa* suggested that "[t]he President shall be chosen annually and shall serve but one year and shall be chosen successively from the different states, changing every year."[56] Similarly, Palmer claimed that after Washington's presidency the fairest process would be rotating the office by lot annually until it cycled through all states, as this would ensure no state would see more than two presidents in 20 years.[57] How different would our history be if the leadership of the executive had been rotated among all the states over time?

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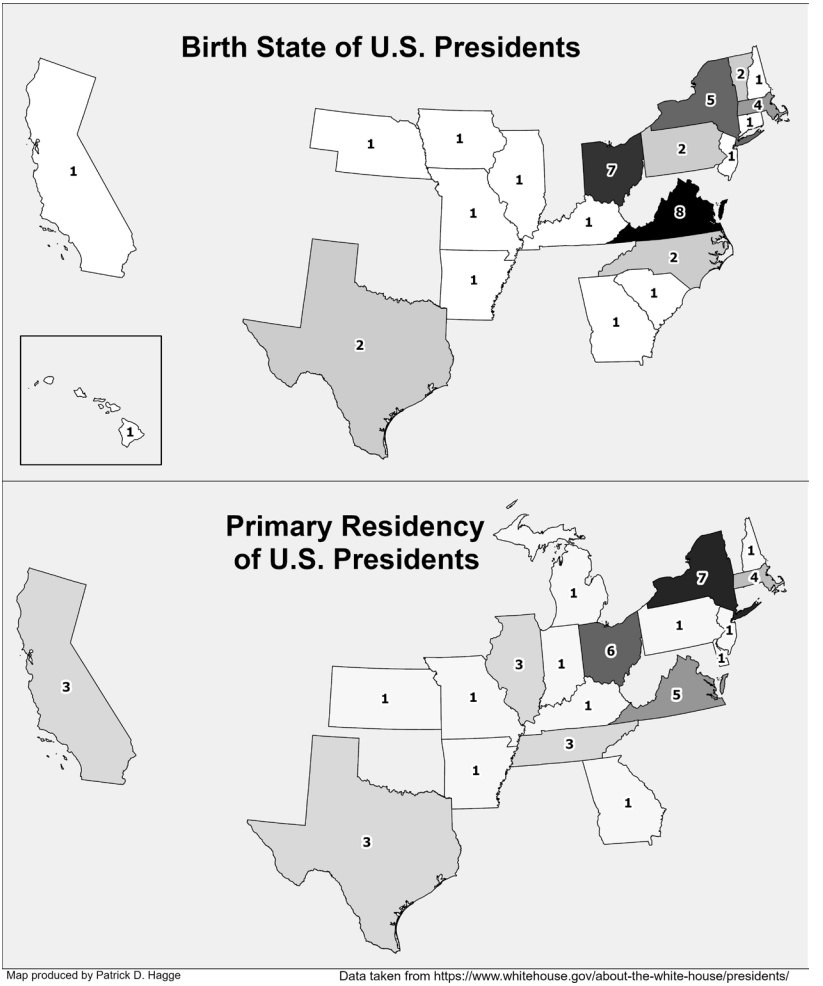
[55] DHRC IX No. 2, 771.
[56] CAF Vol. 4, 112.
[57] DHRC XXIII No. 4, 2487-2488.

Table A.1: Birth State and Primary Residency of Presidents When Assuming Office+				
State	**Birth State**	**Total**	**State of Primary Residency**	**Total**
Virginia	Washington, Jefferson Madison, Monroe, W.H. Harrison, Taylor, Tyler, Wilson	8	Washington, Jefferson, Madison, Monroe, Tyler	5
Ohio	Grant, Hayes, Garfield, B. Harrison, McKinley, Taft, Harding	7	W.H. Harrison, Hayes, Garfield, McKinley, Taft, Harding	6
New York	Van Buren, Fillmore, T. Roosevelt, F.D. Roosevelt, Trump	5	Van Buren, Fillmore, Arthur, Cleveland, T. Roosevelt, F.D. Roosevelt, Trump	7
Massachusetts	J. Adams, J. Q, Adams, Kennedy, G.H.W. Bush	4	J. Adams, J.Q. Adams, Coolidge, Kennedy	4
California	Nixon	1	Hoover, Nixon, Reagan	3
Illinois	Reagan	1	Lincoln, Grant, Obama	3
Tennessee	--	--	Jackson, Polk, A. Johnson	3
Texas	Eisenhower, L.B. Johnson	2	L.B. Johnson, G.H.W. Bush, G. W. Bush	3
Pennsylvania	Buchanan, Biden	2	Buchanan	1
North Carolina	Polk, A. Johnson	2	--	--
Vermont	Arthur, Coolidge	2	--	--
Arkansas	Clinton	1	Clinton	1
Georgia	Carter	1	Carter	1
Kentucky	Lincoln	1	Taylor	1
Missouri	Truman	1	Truman	1
New Hampshire	Pierce	1	Pierce	1
New Jersey	Cleveland	1	Wilson	1
Connecticut	G.W. Bush	1	--	--
Hawaii	Obama	1	--	--

Table A.1: Birth State and Primary Residency of Presidents When Assuming Office+				
State	**Birth State**	**Total**	**State of Primary Residency**	**Total**
Iowa	Hoover	1	--	--
Nebraska	Ford	1	--	--
South Carolina	Jackson	1	--	--
Delaware	--	--	Biden	1
Indiana	--	--	B. Harrison	1
Kansas	--	--	Eisenhower	1
Michigan	--	--	Ford	1

Almost half (twenty-four) of the states cannot claim a president by birth or state of residency. They are: Alabama, Alaska, Arizona, Colorado, Florida, Idaho, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Washington, West Virginia, Wyoming.

+ Table created from biographies at The White House. "Presidents." Aug. 30, 2024. https://www.whitehouse.gov/about-the-white-house/presidents/.



Map produced by Patrick D. Hagge

Data taken from https://www.whitehouse.gov/about-the-white-house/presidents/

II.8.

The Washington Effect

Kathleen Bartoloni-Tuazon

The weather in late winter and early spring of 1789 was typically uncertain. Although March 4 had been set as the date for the First Federal Congress to convene, representatives and senators were slow to arrive as they dealt with weather, business, and family matters. Quorum requirements limited work to unofficial discussions until the requisite numbers arrived—on April 1 for the House and April 6 for the Senate. The electoral votes waited to be counted until a quorum in the Senate was achieved, which happened with the arrival of Richard Henry Lee of Virginia. The Senate could now count the votes for president and vice president—a unanimous sixty-nine electoral votes for George Washington as president and thirty-four for John Adams. Finally counting the votes, after over a month waiting for a quorum, released a cascade of pent-up anticipation. When Washington arrived in New York City on April 23 for his inauguration on April 30, the first capital city's streets had been swept clean and festive illuminations and fanfare at a level rarely seen in the United States could move forward.

George Washington's unanimous election as president is not surprising. He was the most popular and trusted political personality of his time (perhaps any time). Given Washington's standing and influence among Americans, James Madison, Alexander Hamilton, and others had believed his attendance to be vital to the federal convention that met in Philadelphia of 1787 to draft the new Constitution. Once assembled, the delegates elected Washington as the Philadelphia Convention's president and considered him indispensable to the country's future. Pierce Butler of South Carolina recalled, "many of the members cast their eyes toward General Washington as President" during those hot summer

months and considered that their presiding officer would be the first president under the Constitution, as well.* The presidential election of 1792 went much the same. Washington was elected unanimously with 132 votes, one from each elector. John Adams received seventy-seven votes, enough to secure the vice presidency once again. This record of unanimity in the voting for president was a phenomenon of Washington's esteem and not something that could be counted on for future elections.

Washington's presumed leadership as first president quelled concerns about the office of president and how that person would be elected; however, the worry about what the future might hold was ever-present. During the drafting of the Constitution, the framers' discussion of a popular vote vs. an electoral process addressed these concerns. They believed that the problem of the vote by the people was that they would be taken in by corrupt candidates, and that they would favor local leaders over others since news of the country outside their locality was not easy to get. The latter is not a problem we have today in our 24-hour news cycle and pervasive social media; a candidate's national recognition is not a problem. Our problem these days is discerning fact from fiction among all the noise.

Washington's celebrity was international after the American Revolution and, as a result, his fame and the trust he instilled made his unanimous election a foregone conclusion. However, the "locally famous" dynamic can be seen in the 1789 and 1792 electoral votes for vice president. In both cases, John Adams received the second-most votes but many of the other votes for the second position went to regionally recognized political figures like Governor George Clinton of New York or more obscure but "worthy" men from the various states.

The other main concern with a popular vote was bigger even than Washington. Sectionalism and representation were attached at the hip and that attachment loomed large. In a popular vote system, free whites of the South would be a minority. The Electoral College scheme minimized this. It did likewise for small states. This ongoing concern about giving equal standing to minority voices has become one of the great criticisms of the Electoral

College process today. As America has expanded from the original thirteen states to the nation it is today, a variety of minority voices threaten to overtake and skew our presidential elections. Widespread trust in Washington masked antagonisms that plagued the country in the Early Republic, but without the Washington effect, the underlying compromises in the Constitution comprise wicked problems that just become more difficult to solve.

*Note: The Pierce Butler quote can be found in, Pierce Butler to Weedon Butler, May 5, 1788, from Max Farrand, ed., *Records of the Federal Convention of 1787*, rev. ed. (New Haven, 1937 [reprinted 1966]), 4 vols, III, 302.

11.9.

Letters from an American: September 20, 2024[1]

Heather Cox Richardson

On September 16, CNN senior data reporter Harry Enten wrote that while it's "[p]retty clear that [Democratic candidate Vice President Kamala] Harris is ahead nationally right now… [h]er advantage in the battlegrounds is basically nil. Average it all, Harris'[s] chance of winning the popular vote is 70%. Her chance of winning the electoral college is 50%." Two days later, on September 18, Senator Lindsey Graham (R-SC) skipped votes in the Senate to travel to Nebraska, where he tried to convince state legislators to switch the state's system of allotting electoral votes by district to a winner-take-all system. That effort so far appears unsuccessful.

In a country of 50 states and Washington, D.C.—a country of more than 330 million people—presidential elections are decided in just a handful of states, and it is possible for someone who loses the popular vote to become president. We got to this place thanks to the Electoral College, and to two major changes made to it since the ratification of the Constitution.

The men who debated how to elect a president in 1787 worried terribly about making sure there were hedges around the strong executive they were creating so that he could not become a king.

Some of the delegates to the Constitutional Convention wanted Congress to choose the president, but this horrified others who believed that a leader and Congress would collude to take over the government permanently. Others liked the idea of direct election of the president, but this worried delegates from smaller

[1] Reprinted by permission of Heather Cox Richardson.

states, who thought that big states would simply be able to name their own favorite sons. It also worried those who pointed out that most voters would have no idea which were the leading men in other states, leaving a national institution, like the organization of Revolutionary War officers called the Society of the Cincinnati, the power to get its members to support their own leader, thus finding a different way to create a dictator.

Ultimately, the framers came up with the election of a president by a group of men well known in their states but not currently office-holders, who would meet somewhere other than the seat of government and would disband as soon as the election was over. Each elector in this so-called Electoral College would cast two votes for president. The man with the most votes would be president, and the man with the second number of votes would be vice president (a system that the Twelfth Amendment ended in 1804). The number of electors would be equal to the number of senators and representatives allotted to each state in Congress. If no candidate earned a majority, the House of Representatives would choose the president, with each state delegation casting a single vote.

In the first two presidential elections—in 1788–1789 and 1792—none of this mattered very much, since the electors cast their ballots unanimously for George Washington. But when Washington stepped down, leaders of the newly formed political parties contended for the presidency. In the election of 1796, Federalist John Adams won, but Thomas Jefferson, who led the Democratic-Republicans (which were not the same as today's Democrats or Republicans) was keenly aware that had Virginia given him all its electoral votes, rather than splitting them between him and Adams, he would have been president.

On January 12, 1800, Jefferson wrote to the governor of Virginia, James Monroe, urging him to back a winner-take-all system that awarded all Virginia's electoral votes to the person who won the majority of the vote in the state. He admitted that dividing electoral votes by district "would be more likely to be an exact representation of [voters'] diversified sentiments" but, defending his belief that he was the true popular choice in the country in 1796, said voting by districts "would give a result very different from

what would be the sentiment of the whole people of the US. were they assembled together."

Virginia made the switch. Alarmed, the Federalists in Massachusetts followed suit to make sure Adams got all their votes, and by 1836, every state but South Carolina, where the legislature continued to choose electors until 1860, had switched to winner-take-all.

This change horrified the so-called Father of the Constitution, James Madison, who worried that the new system would divide the nation geographically and encourage sectional tensions. He wrote in 1823 that voting by district, rather than winner-take-all, "was mostly, if not exclusively in view when the Constitution was framed and adopted." He proposed a constitutional amendment to end winner-take-all.

But almost immediately, the Electoral College caused a different crisis. In 1824, electors split their votes among four candidates—Andrew Jackson, John Quincy Adams, Henry Clay and William Crawford—and none won a majority in the Electoral College. Although Jackson won the most popular votes and the most electoral votes, when the election went to the House, the state delegations chose Adams, the son of former president John Adams.

Furious Jackson supporters thought a developing elite had stolen the election, and after they elected Jackson outright in 1828, the new president on December 8, 1829, implored Congress to amend the Constitution to elect presidents by popular vote. "To the people belongs the right of electing their Chief Magistrate," he wrote; "it was never designed that their choice should in any case be defeated, either by the intervention of electoral colleges or…the House of Representatives."

Jackson warned that an election in the House could be corrupted by money or power or ignorance. He also warned that "under the present mode of election a minority may…elect a President," and such a president could not claim legitimacy. He urged Congress "to amend our system that the office of Chief Magistrate may not be conferred upon any citizen but in pursuance of a fair expression of the will of the majority."

But by the 1830s, the population of the North was exploding while the South's was falling behind. The Constitution counted enslaved Americans as three fifths of a person for the purposes of representation, and direct election of the president would erase that advantage slave states had in the Electoral College. Their leaders were not about to throw that advantage away.

In 1865 the Thirteenth Amendment ended slavery (except as punishment for a crime) and scratched out the three-fifths clause, meaning that after the 1870 census the southern states would have more power in the Electoral College than they did before the war. In 1876, Republicans lost the popular vote by about 250,000 votes out of 8.3 million cast, but kept control of the White House through the Electoral College. As Jackson had warned, furious Democrats threatened rebellion. They never considered Republican Rutherford B. Hayes, whom they called "Rutherfraud," a legitimate president.

In 1888 it happened again. Incumbent Democratic president Grover Cleveland won the popular vote by about 100,000 votes out of 11 million cast, but Republican candidate Benjamin Harrison took the White House thanks to the 36 electoral votes from New York, a state Harrison won by fewer than 15,000 votes out of more than 1.3 million cast. Once in office, he and his team set out to skew the Electoral College permanently in their favor. Over twelve months in 1889–1890, they added six new, sparsely populated states to the Union, splitting the territory of Dakota in two and adding North Dakota, South Dakota, Montana, Washington, Idaho, and Wyoming while cutting out New Mexico and Arizona, whose inhabitants they expected would vote for Democrats.

The twentieth century brought another wrench to the Electoral College. The growth of cities, made possible thanks to modern industry—including the steel that supported skyscrapers—and transportation and sanitation, created increasing population differences among the different states.

The Constitution's framers worried that individual states might try to grab too much power in the House by creating dozens and dozens of congressional districts, so they specified that a district could not be smaller than 30,000 people. But they put no

upper limit on district sizes. After the 1920 census revealed that urban Americans outnumbered rural Americans, the House in 1929 capped its numbers at 435 to keep power away from those urban dwellers, including immigrants, that lawmakers considered dangerous, thus skewing the Electoral College in favor of rural America. Today the average congressional district includes 761,169 individuals—more than the entire population of Wyoming, Vermont, or Alaska—which weakens the power of larger states.

In the twenty-first century the earlier problems with the Electoral College have grown until they threaten to establish permanent minority rule. A Republican president hasn't won the popular vote since voters reelected George W. Bush in 2004, when his popularity was high in the midst of a war. The last Republican who won the popular vote in a normal election cycle was Bush's father, George H.W. Bush, in 1988, 36 years and nine cycles ago. And yet, Republicans who lost the popular vote won in the Electoral College in 2000—George W. Bush over Democrat Al Gore, who won the popular vote by about a half a million votes—and in 2016, when Democrat Hillary Clinton won the popular vote by about 3 million votes but lost in the Electoral College to Donald Trump.

In our history, four presidents—all Republicans—have lost the popular vote and won the White House through the Electoral College. Trump's 2024 campaign strategy appears to be to do it again (or to create such chaos that the election goes to the House of Representatives, where there will likely be more Republican-dominated delegations than Democratic ones).

In the 2024 election, Trump has shown little interest in courting voters. Instead, the campaign has thrown its efforts into legal challenges to voting and, apparently, into eking out a win in the Electoral College. The number of electoral votes equals the number of senators and representatives to which each state is entitled (100 + 435) plus three electoral votes for Washington, D.C., for a total of 538. A winning candidate must get a majority of those votes: 270.

Winner-take-all means that presidential elections are won in so-called swing or battleground states. Those are states with

election margins of less than 3 points, so close they could be won by either party. The patterns of 2020 suggest that the states most likely to be in contention in 2024 are Arizona, Georgia, Michigan, Nevada, North Carolina, Pennsylvania, and Wisconsin, although the Harris-Walz campaign has opened up the map, suggesting its internal numbers show that states like Florida might also be in contention. Candidates and their political action committees focus on those few swing states—touring, giving speeches and rallies, and pouring money into advertising and ground operations.

But in 2024 there is a new wrinkle. The Constitution's framers agreed on a census every ten years so that representation in Congress could be reapportioned according to demographic changes. As usual, the 2020 census shifted representation, and so the pathway to 270 electoral votes shifted slightly. Those shifts mean that it is possible the election will come down to one electoral vote. Awarding Trump the one electoral vote Nebraska is expected to deliver to Harris could be enough to keep her from becoming president.

Rather than trying to win a majority of voters, just 49 days before the presidential election, Trump supporters—including Senator Graham—are making a desperate effort to use the Electoral College to keep Harris from reaching the requisite 270 electoral votes to win. It is unusual for a senator from one state to interfere in the election processes in another state, but Graham similarly pressured officials in Georgia to swing the vote there toward Trump in 2020.

Notes from Web

https://usafacts.org/articles/what-are-the-current-swing-states-and-how-have-they-changed-over-time/
https://founders.archives.gov/documents/Jefferson/01-31-02-0256
https://founders.archives.gov/documents/Madison/04-03-02-0109
https://fairvote.org/how-the-electoral-college-became-winner-take-all/

https://www.presidency.ucsb.edu/documents/first-annual-message-3
https://www.visitthecapitol.gov/sites/default/files/documents/resources-and-activities/CVC_HS_ActivitySheets_CongApportionment.pdf
https://www.usatoday.com/story/news/2023/01/02/what-state-has-lowest-population-us-states-ranked-population/10476960002/
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Notes from X

metzgov/status/1836773273230594425
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Section Two
Modern Efforts to Reform or Abolish the Electoral College

II.10.

Studying Constitutional Reform Efforts

Gary Bugh

One way to approach the study of attempts to change a constitutional institution like the Electoral College is in reference to a political concept. An idea such as popular sovereignty, representation, federalism, or legitimacy may serve as a guidestone to help a scholar identify and evaluate evidence. This essay focuses on representation, which is closely related to popular sovereignty, to investigate arguments from congressional debates on amending the presidential selection system.[1] Some American political theorists hold that traditional and popular views frame U.S. political concepts and issues, including representation.[2] Scholars have also argued that participants in constitutional amendment deliberations have tended to rely on these two perspectives when discussing principles.[3] Without denying the existence of multiple

[1] For an extensive treatment of appeals to representation during Electoral College reform debates, see Gary Bugh, "Representation in Congressional Efforts to Amend the Presidential Election System," in *Electoral College Reform: Challenges and Possibilities*, ed. Gary Bugh (2010; New York, NY: Routledge, 2016), 5–18. Published with permission of Taylor & Francis Group.

[2] See, for example, Robert A. Dahl, *A Preface to Democratic Theory* (1956; Chicago, IL: University of Chicago Press, 1967), chaps. 1, 2; Robert A. Dahl, *Democracy and its Critics* (New Haven, CT: Yale University Press, 1989), 29–30, 218–19; and James A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government*, rev. ed. (1990; New Haven, CT: Yale University Press, 1998), 9–19, and in reference to representation and sovereignty, 38–45, 62–65.

[3] See, for example, Bruce Ackerman, *We the People I: Foundations* (Cambridge, MA: Belknap Press, 1991); David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995* (Lawrence, KS: Universi-

political discourses, congressional electoral reform attempts may have included appeals to at least two different versions of representation. Drawing out some of these references may help us better understand the minimal successes and ultimate failures of efforts to replace the Electoral College with another selection method.

Traditional representation involves indirect determination of representatives who govern on behalf of many state and national interests, thereby preventing factious rule. According to the Federalists, writing in favor of the proposed constitution in 1787–1788, institutions such as the bicameral Congress, indirectly selected Senate, and state-based system of presidential electors, along with an extensive territory, would provide mixed and balanced representation of the people.[4] As James Madison argued in reference to the selection of the president, this form of representation would be "a very compound source … presenting at least as many federal as national features."[5] In *Federalist No. 10*, he famously explained that the new constitutional order would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens."[6] Such representation, he continued, would ensure popular sovereignty because "the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose."

Popular representation involves citizens, each possessing one vote, directly electing their representatives who in turn govern for the sovereign people. During the ratification struggle, Anti-Feder-

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ty Press of Kansas, 1996); and Morone, *Democratic Wish*.

[4] For a discussion about the different views of representation expressed by Federalists and Anti-Federalists, see Morone, *Democratic Wish*, 15, 62–65; and Herbert J. Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* (Chicago: University of Chicago Press, 1981), 43–47, 72–73.

[5] James Madison, "Federalist, no. 39, 16 Jan. 1788," in *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner, vol. 1 (Indianapolis, IN: Liberty Fund, 1987), 275, http://press-pubs.uchicago.edu/founders/documents/v1ch8s27.html.

[6] Madison, "Federalist, no. 10, 22 Nov. 1787," 130, http://press-pubs.uchicago.edu/founders/documents/v1ch4s19.html.

alists conveyed support for popular representation.[7] For example, Brutus defended the "full, fair, and equal representation of the people," and Federal Farmer held that "[t]he happiness of the people at large must be the great object with every honest statesman."[8] Brutus elaborated that "the people do not declare their consent by themselves in person, but by representatives, chosen by them, who are supposed to know the minds of their constituents" and act accordingly.[9] A few decades after the founding, Thomas Jefferson criticized the three branches of the national government for being insulated from the will of the people and proposed that every citizen should participate in the election of all representatives, from local judges and sheriffs to members of Congress and the president.[10] Supreme Court rulings of the 1960s mandated equal legislative district populations following the principle of "one person, one vote." Political equality not only entails that each person's vote carries the same weight, but also that higher numbers of voters produce better decisions.

Congressional debates over proposed electoral amendments offer examples of members referencing traditional representation. During the 1970 Senate effort for nationwide popular vote of the president, opponents held in part that the change would greatly enhance the influence of urban factional groups located in pivotal states, undercutting diverse representation across America.[11] The 1979 direct election Senate debates involved defending the Electoral College as representing several interests because it was not based on political equality. In the "American idea of democracy,"

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[7] See Storing, *What the Anti-Federalists Were For*, 17–18, 43–47.

[8] Brutus, "No. 1, 18 Oct. 1787," 124, http://press-pubs.uchicago.edu/founders/documents/v1ch4s14.html; and Federal Farmer, "No. 1, 8 Oct. 1787," 259, http://press-pubs.uchicago.edu/founders/documents/v1ch8s12.html.

[9] Brutus, "No. 1, 18 Oct. 1787," 124, http://press-pubs.uchicago.edu/founders/documents/v1ch4s14.html.

[10] Thomas Jefferson, "To Samuel Kercheval July 12, 1816," in *The Portable Thomas Jefferson*, ed. Merrill D. Patterson (New York, NY: Penguin Books, 1977), 552–61.

[11] See, for example, *Congressional Record*, 91st Cong., 2d sess. (1970), 31138, 31146, 32075–76.

as Howard Cannon (D-NV) called it, rather than "one person, one vote," representation took into account the interests of states and the nation.[12] According to Orrin Hatch (R-UT), this was possible because of several aspects of our constitutional system, including "checks and balances, separation of powers, federalism, concurrent majorities, limitations of power, and protection of minority rights."[13] He asserted that the "one-man, one-vote principle" did not apply to any branch of government, including the House of Representatives.[14] This perspective was different than popular representation, which other congressional members have expressed in relation to electoral reform.

The following appeals to popular representation are from congressional deliberations over direct election in 1969, an effort that won House passage before going to the Senate. Proponents sought to eliminate the winner-take-all method, arguing that it was giving voters in the most populated and competitive states the greatest influence in presidential elections. They criticized the current system as undemocratic because it denied "equality" and "the popular will."[15] Rather than facilitating factions, the Electoral College was preventing equally weighted votes and consequently the people's ability to control government. By assigning the same value to each citizen's vote, nationwide direct election would ensure "one person, one vote."[16] For William Ryan (D-NY), "the principle that in a democracy every citizen should have an equal vote is controlling."[17] Equally counting every person's vote, as Robert McClory (R-IL) explained, would "give expression to what is the popular will of the people."[18] Their strong support for "an absolutely equally weighted vote," claimed Clark MacGregor (R-

[12] *Congressional Record*, 96th Cong., 1st sess. (1979), 16547.
[13] Ibid., 15875.
[14] Ibid., 17708.
[15] See, for example, *Congressional Record*, 91st Cong., 1st sess. (1969), 24966, 24970–72, 24975–78, 25126.
[16] See, for example, Ibid., 24971–72, 24965, 24972, 25137–39, 25149–51, 25155, 25384.
[17] Ibid., 25138.
[18] Ibid., 24970.

MN), was out of a "philosophical conviction" in which "we believe deeply…in the equal worth and integrity of each individual."[19]

Electoral College reform deliberations in Congress have included appeals to different views of representation. Some participants integrated a traditional perspective, arguing in favor of preventing factious rule and providing diverse representation. Others appealed to a popular view, emphasizing equal suffrage and the will of the people. Understanding that different perspectives of representation have been part of efforts to change the presidential selection system may help explain why an Electoral College reform attempt has not succeeded and just some of what it might take for one to do so.

[19] Ibid., 25149.

II.11.

The Electoral Count Reform Act of 2022

Robert M. Alexander

Objections to electoral votes are rare and the rejection of state certified electoral votes by Congress has never occurred. Indeed, the counting of electoral votes had become perfunctory even in a time of polarized politics. In 2013, the electoral count was less than 25 minutes. In 2017, it was less than 45 minutes, but included multiple different objections by House Democrats who failed to obtain co-signers from any member of the Senate. Chiefly, they claimed that Donald Trump's victory was due to Russian interference in the election. Notably, Joe Biden angrily shot down those objections, receiving a standing ovation from Republicans at one point when he stated: "IT IS OVER" after an objection by Representative Pramila Jayapal.

The Electoral Count Act of 1887 (ECA) was adopted to deal with disputed electoral votes to be tabulated in the joint session of Congress on January 6th. The Act came about after the disputed election of 1876 and was used a handful of times in the 130-plus years from its adoption.

The ECA established a procedure that Congress must follow when two or more slates of electors are received or additional disputes over electoral votes emerge. Primarily, electoral slates that carry the signature of a state's governor are viewed as the certified electors of that state. If there are objections to an electoral slate, it must be in writing and co-signed by at least one House member and one Senate member. If that occurs, each chamber would meet separately to entertain the objection. For an objection to be approved, it must gain a majority of votes in *both* chambers.

Shortly after the 2020 election, however, a swirl of reports suggested that some Republican state legislatures might seek to appoint their own electors. As that possibility became less likely, attention turned to a plan where Republican electors in states that Trump narrowly lost would still cast their votes in an attempt to keep hopes alive that Congress or Vice President Mike Pence himself would either accept those votes or not accept any votes at all from disputed states. The plan was developed by lawyer John Eastman in service to Donald Trump's post-election efforts to win the election. Pence ultimately did not seek to unilaterally reject electoral votes, but did he entertain objections to specific electoral slates as provided for under the ECA. None of the objections were successful and all electoral votes remained intact by the end of Congress's work.

The counting of electoral votes on that day was unprecedented. For the first time in American history, Congress's certification of electoral votes was disrupted when Trump supporters breached the Capitol and members of Congress took shelter for their own safety. Millions of dollars of damage was done, a rioter was shot and killed, nearly 150 law enforcement officers were assaulted, and over a 1,000 people faced charges stemming from the riot.

In an effort to prevent another January 6th, the 117th Congress worked to tighten language around the ECA. The Electoral Count Reform Act (ECRA) was passed with bipartisan support in December of 2022. Chiefly, the Act raised the threshold to lodge an objection from one member in each House to 20 percent of the members from each House, affirmed that the vice president's role is purely ceremonial and has no discretion to determine electoral votes, and provides for expedited judicial review to the United States Supreme Court if necessary. The Act also clearly identifies that governors are the only officials whose signature can be used to certify electoral votes from a state and it limited the role of state legislatures in overriding the popular vote by declaring a "failed election."

It is noteworthy that while the ECA had been criticized over the years, revising the statute was not a priority for Congress until the events of January 6th occurred.

II.12.

Four Big Points about Altering or Abolishing the Electoral College

Jack N. Rakove

If I were a lawgiver, like Moses, Lycurgus, or Solon, I would abolish our existing state-based system of appointing presidential electors, and institute a National Popular Vote (NPV), to be held in a single constituency—let's call it the United States of America—where the vote of every citizen would have equal weight. Alas, I am only a retired professor of history and political science. The sole contribution I can make to this worthy cause is to write essays like this one, identifying several critical points that any thoughtful reader should know and consider.

The first point is historical. It is easy to criticize the framers of the Constitution for adopting such an awkward and untested mechanism. They did not specify how presidential electors would be appointed. Many thought the electoral system would never produce a decisive majority, and that some kind of contingent election would need to occur. By having every elector cast two votes, one going to a nominee from another state, they created a mechanism in which, as James Madison shrewdly observed, the *individual* second choices of a majority of electors could become the *collective* first choice.

All of these criticisms seem fair, at first glance. But they overlook one crucial point. There was no precedent for the problem the framers were trying to solve, which was to figure out how to elect a national executive, consistent with republican principles, in a decentralized polity like the United States. The dominant forms of executive power in their world were either constitutional monarchy or the primitive form of ministerial (or cabinet) government

that had emerged in eighteenth-century Britain. The American revolutionaries had rejected both. Before we reject their decisions out of hand, we need to cut them some constitutional slack and appreciate the daunting problems they faced.

The second point is political. As soon as presidential elections became competitive—that is, in 1796—the reigning expectations of 1787 were disproven. The framers had assumed, with highly plausible reasons, that it would be difficult for a national popular vote to produce a decisive result. But in fact, once George Washington announced his retirement, there were two obvious contenders for the presidency, Vice President John Adams and Thomas Jefferson, and a national popular vote would have worked. Equally important, *all* the electors appointed in 1796 were Federalist or Republican party loyalists. None turned out to be the disinterested, independent-minded citizens the framers had naively imagined filling the office.

The third point is both constitutional and contemporary. The preferred method for circumventing the existing rules for presidential elections is the National Popular Vote Interstate Compact (NPVIC). Under its terms, a coalition of states casting the 270 votes needed to capture an electoral majority would legally oblige their electors to vote for the winning candidate in the national popular vote, wholly independent of the preferences of their own electorate. This has become the Rube Goldberg device being summoned to action to evade the daunting obstacle of an Article V constitutional amendment.

The NPVIC does have a certain mischievous ingenuity. But it is fatally flawed for two reasons. First, none of its advocates has ever satisfactorily explained how it escapes the Interstate Compact Clause of Article I, Section 10 of the Constitution. The fact that Congress and the Supreme Court have exempted other innocuous compacts from scrutiny does not explain why they would do so when the appointment of the most important office in the nation (and indeed the world) is at stake. Second, it is difficult if not impossible to understand how a decision of this magnitude would ever attain political legitimacy through this Rube Goldberg contraption. It would become the immediate source of litigation and

public controversy. One can hardly allow the political stability of the nation—which is in grave enough danger already—to rest on this stratagem.

Thus for advocates of the NPV, there is no alternative to an Article V amendment. The real challenge is to strategize how to make an NPV amendment politically feasible and to decide which arguments are most compelling. The most powerful objection would likely be that the small states would never accept this reduction in their influence. The best reply to this claim—my final point—is simply to explain why none of us ever votes on the size (meaning populace) of their state. The real interests that determine our votes are scattered across *all* the states, admittedly in unequal proportions, but in ways to which all Americans respond. This is my fourth and final point, but one that many Americans still fail to grasp.

II.13.

Does the Electoral College Protect State Interests?

George C. Edwards III

In 2000 and 2016, the presidential candidate who received the most votes for president lost the election. It may very well happen again in the tight election of 2024. In 2016, the Electoral College favored Donald Trump, but in 2024 it may favor Kamala Harris. It is a capricious system favoring the votes of some citizens over others, depending solely upon the state in which they live.

Forty-eight states have adopted the winner-take-all system, which awards *all* the electoral votes allocated to a state to the plurality winner of the state. This system effectively disenfranchises voters who support losing candidates in each state. Nearly three million people voted for Al Gore for president in Florida in 2000. Because George W. Bush won 537 more votes than Gore, however, he received *all* of Florida's electoral votes. The votes for Gore played no role in the national election.

In a multiple-candidate contest (as in 1992, 1996, 2000, and even 2016), the winner-take-all system may suppress the votes of the *majority* as well as the minority. In 2000, pluralities rather than majorities determined the allocation of electoral votes in eight states, including Florida and Ohio. In 2016, pluralities decided the electoral votes in fourteen states. In each case, a minority of voters determined how *all* of their state's electoral votes would be cast. A candidate thus can win some states by very narrow margins, lose other states by large margins, and so win the electoral vote while losing the popular vote.

How can we reconcile such a selection system with the ideal of political equality, one of the most deeply ingrained of democratic principles?

The principal justification for the Electoral College is that it is necessary to protect important interests that would be overlooked or harmed under a system of direct election of the president. Proponents argue that the allocation of electoral votes by states that then cast their votes as units ensures that presidential candidates will be attentive to and protective of state-based interests, especially the interests of states with small populations.

Yet states do not embody coherent, unified interests to protect. Even the smallest state has substantial diversity of interest and opinion within it. There is not just one point of view within a state. That is why eleven states won by Donald Trump in 2016 –including Indiana, Missouri, Montana, North Dakota, and West Virginia, solid Republican states—were represented in the US Senate by Democratic senators and why California, New York, and Massachusetts, among the bluest of states, often elect Republican governors.

Do special state interests dominate voters' decisions? Wisconsin harvests about sixty percent of the annual cranberry crop. One could say that cranberries are a special interest in Wisconsin. When Badger State voters cast their ballots for president, are they thinking about cranberries? Do they say, in effect, "forget about immigration, inflation, democracy, abortion and the other burning issues of the day—what we really care about are cranberries?" Of course not. In the voluminous academic literature on presidential elections, there is no evidence that citizens vote on the basis of local issues. Moreover, do presidential candidates run ads featuring their views on cranberries? We know they do not.

Given the many constraints the Constitution places on the acts simple majorities can take, the Senate's extraordinary representation of small states, the power of the Senate filibuster to thwart majorities, and the difficulty of changing these rules, it strains credulity to argue that certain geographically concentrated interests require additional protection from the majoritarian political process.

States with small populations do not have common interests to protect. Instead, they represent a great diversity of core economic interests, including mining, gambling, chemicals, tourism, energy, and agricultural interests ranging from grain and dairy products to hogs and sheep. (Most farmers live in states with large populations, such as California, Texas, Florida, and Illinois.) It is not surprising that small-state representatives do not vote as a bloc in Congress or that their citizens do not vote as a bloc for president. The great political battles of American history have been over ideology and economic interests rather than between small states and large states.

During the general election period, twelve of the smallest states have never had even one presidential candidate visit during the six presidential elections in this century. Three other states have had only one visit, and a fourth state has had only two. In addition to avoiding small states, the candidates also ignore many larger states during the general election. Nine of the twenty-six largest states average less than one visit from a presidential candidate in an election in this century. The electoral college creates incentives for candidates to bypass even many of the very largest states. The combined visits of presidential candidates to California, Texas, New York, and Illinois in the past five elections is six – even though a presidential candidate in each election was from one of those states.

It is difficult to imagine how presidential candidates could be less attentive to small states. Candidates are not fools. They go where the Electoral college makes them go, and it provides strong incentives to focus on competitive states, especially large competitive states. They ignore most small states; in fact, they ignore most of the country.

Candidates would be much more attentive to small states under direct election of the president. Where votes are not aggregated by state, candidates would have incentives to appeal to all voters and not just those strategically located in swing states. An extra citizen's vote in Massachusetts or Texas would count as much as one in Pennsylvania or Florida.

The Electoral College protects no one's interests and violates democratic principles. To replace it, I offer a radical idea, but one with which we have considerable experience. Why not count all the votes and declare the candidate who receives the most votes the winner?

II.14.

Learning to Live with(in) the Electoral College

Randall M. Miller

Over the past quarter century many Americans have been wringing their hands over what they regard as the undemocratic way we choose our president. They note especially that in the 2000 and 2016 elections the candidate who got the most votes from the people did not get the most votes in the Electoral College and lost, with the losing candidate each time gracefully if also somewhat grudgingly conceding the legitimacy of the process while also raising the question of the efficacy of the Electoral College system. Many people, mostly Democrats, worry now that a similar "undemocratic" result might occur in 2024, an election already fraught with threats by the Republican presidential candidate that the election is "rigged" even before the votes are cast and that he will not accept the results unless he wins. That Republicans also have been passing laws to suppress voting, especially by racial minorities, threatening "oversight" and lawsuits against election workers, and "lawyering up" already to challenge election results adds to the sense of urgency to address the concerns people have about the fairness of the presidential election. Americans can make the election process less democratic, and have done so as the disfranchisement of Black Americans and others demonstrated for much of our history. At the same time, many peoples' distrust of American institutions bodes ill for the willingness of people to participate in elections or accept the results of them. All this, too, further raises questions about how to effect and ensure a "democratic" result within the Electoral College framework that people will accept as legitimate, fair, and worthy of their trust.

All that said, whatever reformers propose regarding possible changes in the way Americans nominate and elect their president will not affect the Electoral College's place and function in the current election. Any fundamental change in the Electoral College system will require a constitutional amendment to do so. That is not now, and probably never in our lifetime ever will be, a likely prospect. The Framers made the amendment process difficult to keep "the people" from revising the Constitution on popular impulses or passions. Regarding the Electoral College, its most immediate defect in the 1787 constitutional arrangement – the provision that the president would be the person who got the most votes of at least a majority in the Electoral College and the vice president would be the person who got the next-highest number of votes – became apparent with the surprisingly unanticipated, and for many of the Framers' generation unwelcome, rise of political parties. The election of 1796 that resulted in the two candidates from opposite "parties" ending up as president and vice president and then the election of 1800 that resulted in a tie between the two Jeffersonian Republican candidates, which was only settled after many votes in the House of Representatives and some intrigue to give Thomas Jefferson the presidency – these experiences led the Founding generation to pass the Twelfth Amendment to clean up the mess by in effect recognizing that political parties would be part of the electoral process and by requiring electors to cast separate votes for president and vice president. But the basic principle of the Electoral College was left untouched. State legislatures still would decide by the means of their own choosing how and who to select as electors.

The Framers' purpose in creating the Electoral College was not to encourage democratic participation and a democratic outcome. It was, rather, to insure that only the "best men" would be selected as presidents by insulating the selection and election process directly from "the people." The Framers wanted only men of "good reputation" to be elected president. They feared not only kings but also demagogues who might become despots. Thus they built in a double insulation from "the people" by permitting state legislatures select the electors who in turn would elect the pres-

ident. The assumption was that state legislators in nominating a presidential candidate, if they chose to nominate anyone at all, would know the men of good reputation within their states, or beyond, to nominate because such men would have distinguished themselves by their property, character, and public service – the best measures of reputation. Ditto in selecting electors. To be sure, soon enough, with the emergence of political parties appealing for popular support, state legislatures moved in a democratic direction by providing for the direct election of presidential electors, and by the 1830s political parties moved away from nominating their candidates by caucuses of party leaders to having delegates to nominating conventions make the decision. All this was a more democratic direction in the presidential election process but also one that required no change in the Electoral College system itself. And so it went to our own day, now with seemingly popular nomination of candidates through primaries and direct election of electors bound by pledge to support a particular candidate.

And that is where it will stay for 2024 at least and likely well after. What that means for those trying to make the presidential election process "democratic" is that they will have to find ways to do so within the Electoral College framework. There is no political groundswell for amending the Constitution in favor of some as yet undefined "democratic" system of direct election; nor is there an outline for how to set up and manage the infrastructure and monitoring methods to ensure such elections are fair in every sense. Obvious though that is, it is worth saying lest people waste time, resources, and hope on fools' errands thinking there's an easy fix to what they see as a problem. In a word, reformers and "the people" will have to learn to live with and within the Electoral College system.

That is not to say that efforts to make the selection and election processes more democratic are futile. Far from it. Proposals for and even experiments with seemingly more democratic selection and election processes are going on in various states. They include ending winner-take-all elections in favor of proportionate results in claiming electoral votes in states, establishing ranked-order voting, easing voter registration and participation through same-day

registration and various mail-in voting methods, protecting the safety and integrity of voting places and workers, requiring civic education in schools to encourage informed and greater voter participation, and more. All promise a more democratic engagement and likely a more centrist popular result that will reflect the "will of the people." Or so many experts say and their proponents hope. Add to that the National Popular Vote Interstate Compact, which has attracted support from several states, and there seems some momentum toward a national solution that does not require a constitutional amendment.

Whatever the success of such reform proposals and experiments, the effort will not be for naught. The more people learn about the selection and election process for all offices the more likely they are to participate and, upon seeing defects in selection and election practices and systems, to push to correct and improve them. Such experience might in time even lead to popular support to scrap the Electoral College system altogether. And "the people" would not have to wait on legislators or those in Congress to initiate an amendment. The people might do so by pushing that and initiating it within their own states, as the Constitution allows.

11.15

Replacing the Electoral College

Paul Schumaker

The Electoral College is a historical relic that that, while it did not result in a mismatch between electoral and popular votes on November 5, impacted that election in many ways. For example, attention was focused on Donald Trump and Kamala Harris contesting the Blue Wall states rather than the support for the candidates throughout the country. If left intact, it is likely to impact future elections in many ways. Its most positive feature is that it was designed to thwart populist demagogues from becoming president, but it no longer fulfills that function, as illustrated by Donald Trump first assuming presidential office by winning in the College after losing the popular vote in 2016, and his then calling for an insurrection on January 6, 2021, to employ previously obscure elements of the Electoral College process to prevent his being held accountable for his failures as our president.

Because citizens in all but a few in-play states have good reasons to believe their votes to determine our only truly national political leader are meaningless, the College contributes to widespread public cynicism about politics. The unexpectedly low voter turnout on November 5 was enhanced by voters in all but the most competitive states thinking their votes did not mater. Given its biases against third-party and independent candidates, citizens have only two realistic voting choices. It contributes to social and political polarization where both Democrats and Republicans see each other as dangerous enemies rather than friendly adversaries whose presence ensures accountability in politics.

This volume contains many other and more detailed arguments about the role of the College in American politics. Here, I

assume its earlier positive functions of facilitating the formation of the United States and allowing us to agree on Constitutional essentials are outweighed by its current negative impacts.

The November 5 election was particularly significant because Donald Trump did and said many things that has prompted widepread fears that as our 47th President he will reduce many democratic processes, institutions, and values, including the role of genuine party competition in other and future elections. While Kamala Harris proved herself to be an effective alternative to Trump, she failed to differentiate herself from Joe Biden and establish herself as a leader who would bring important changes to our national politics. I believe she could have backed the elimination of the College as an illustration of her commitment to extensive political change. Racial and ethnic minorities, younger citizens, and women would have been more energized to support Harris' candidacy if she had made clear her commitment to changing our electoral system that has privileged old, white men in the past and would likely do so in the future.

Our political system needs many reforms to ensure widespread loyalty to it, but our long-standing failure to reform the College is the most visible contributor to—and symbol of—our current malaise, distrust, and division. The president and vice president are our only truly national leaders, and citizens throughout the nation should play a leading and equal role in their selection. The College has been a state-centric system that has minimized the importance of national public purposes that should be central to the belief systems and political participation of American citizens. Of course, states and other associations must continue to play roles in the lives of all Americans, but we need a system for choosing our sole national leader(s) that gives greater prominence to our common American citizenship.

As I have argued and detailed in my *The Twentieth-Eighth Amendment: Beyond Abolishing the Electoral College* (Gatekeeper Press, 2020), we need the best possible alternative for the College that can be provided given current understandings of how various alternatives do or would work. The framers were wise in understanding that determining our national leader through a national

popular election could be fraught with dangers, especially if such a process allowed a person to gain presidential power by appealing to a narrow base susceptible to charismatic appeals and serving various narrow interests.

The dangers of autocratic and/or minority rule and the thwarting of majority rule would not be prevented by the most widely assumed and discussed alternatives: (1) amending the Constitution to select as president the person getting the most votes in a national popular election, and (2) having sufficient state agreement to adopt the National Popular Vote Interstate Compact (NPVIC), a proposal for ensuring that winners of presidential elections have the most popular votes but that bypasses the need for a Constitutional amendment.

As argued by David Dayen in "America is Not a Democracy" (*American Prospect* [Feb. 2024]), we need many constitutional reforms, but we would be ill-served by having a constitutional convention to eliminate the College because that could open the door to wholesale constitutional changes that endanger the leading roles of our Constitution in American life and in generating citizen support for our national government. Changing our method of choosing the president is just one amendment that can be envisioned and could be widely supported that would improve American democracy. We need to make constitutional changes in an incremental, one-at-a-time manner that preserves Constitutional essentials. But the framers of the Constitution had the audacity to include in Article V provisions creating nearly insurmountable obstacles to amending their original but now often outdated provisions in such a manner. Supermajorities for particular amendments in both houses of Congress and the states are required. I now believe that a 28th Amendment should reform Article V to make more possible future amendments – each subject to national deliberation and approval.

To prevail on November 5, Harris should have initiated such deliberations as part of her campaign, and she should have suggested two planks as part of the process for generating a different 28th Amendment than the narrower one focusing on the College that I proposed four years ago. She could have proposed first that

Article V be amended to authorize Congressional approval of future amendments by simple majorities in both the Senate and the House. She should then have supported having citizens – rather than state legislatures – vote on and determine the fate of future amendments. I would urge American politicians and citizens to deliberate on whether a mere majority or a lesser super-majority of citizens (say 60%) would be required to approve such amendments.

Passage of such a 28th Amendment would increase greatly the chances of passage of my earlier proposed reform of abolishing the Electoral College and choosing our president through a process involving two national popular votes. While I provided more details of this proposal in my earlier book, I conclude this brief article by summarizing its basic features.

The first election would replace the current dysfunctional system of state-level primaries and would give all citizens a central role in nominating candidates to run in the final election. While both the Democratic and the Republican Parties could endorse particular candidates whose names would appear on the ballots for the preliminary election, other parties and organizations could endorse additional candidates. Qualified independents could also be included on the preliminary election ballot. Of course, inclusion on this ballot would require meeting qualification criteria that would be developed by future deliberations. These criteria should be sufficiently lax to enable a wide variety of candidates but sufficiently rigorous to make manageable what inevitably would be a lengthy preliminary ballot.

In any event, approval balloting should be used in the preliminary election. Voters would no longer be asked which candidate they most liked but which candidates they trusted to pursue their greatest concerns, whether these be their personal interests, identities, principles, or preferred policies, or the various interests, principles, or preferred policies of the groups and/or communities to which they belong. Such a broad list of the concerns that voters could bring to indicating those candidates they trust or distrust is intended to highlight that voting choices should be influenced by many considerations beyond the sound bites and slogans that are so prominent today. It is intended to prompt voters to think

less narrowly about which candidate best satisfies a single concern but to consider how all candidates could further or threaten their many legitimate concerns.

The five candidates with the greatest net approval would then qualify for the general election. They would be listed on the ballot for the general election conducted about two months after the preliminary elections, and they would participate in debates and receive public financing of their campaigns.

Rank-order ballots should be used in the general election allowing voters to sharpen their choices. If no candidate were ranked first by a majority of voters, current computer technologies would allow for "an instant runoff," in which candidates receiving the least support would be eliminated and the votes of their supporters would then be transferred to their second (or lower but still acceptable) choices. The process of transferring votes would ensure that candidates having narrow support would be eliminated and that the winner had the support of most citizens. Using rank-order voting would maximize the legitimacy not only of the winner but also of our electoral system and of politics generally. Every citizen would be treated as an equal. Every citizen could experience the freedom of voting in a fashion that expressed their most vital public concerns. Every citizen could appreciate that the winner had achieved the greatest public consent and support that is possible in a nation in which citizens have multiple and diverse concerns. Every citizen could understand that the president was highly trusted by other citizens. It would encourage candidates and those who win the presidency to consider the concerns of all citizens. I argue that such a process could result in American politics that strives for the public good and justice.

If this electoral process were in place this year, Donald Trump would almost certainly have failed to become president again. Whether Kamala Harris would have won is uncertain and perhaps even unlikely, but she would have had a better chance to present herself as the most trustworthy of those seeking the highest office in America. In any case, all those who seek not only to preserve but enhance American Democracy should support a movement to rid ourselves of the archaic Electoral College.

Part III

Resources

Resources

Introduction

The following resources illuminate the creation, ratification, and early evolution of the United States' presidential election system.

The first set of resources furnishes a front-row seat to the creation of the United States' presidential election system. Resources 1-26 consist of Madison's *Notes* for the twenty-six days of debate on the issue at the Constitutional Convention in 1787.[1] Resource 27 summarizes the delegates' activities, enumerating each one's speeches, motions, and committee assignments. Resources 28-30 represent a portion of the fruits of their labor (i.e., Articles II, V, and VII of the U.S. Constitution).

The second set of resources provide a sweeping outlook on the ratification of the U.S. Constitution in 1787-88. Resource 31, a timeline, offers a chronological overview of the ratification contest.

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[1] Four things may be said of the version of Madison's *Notes* which appears in this volume. First, it mostly replicates that published by Yale University's Lillian Goldman Law Library (the main distinction being the latter's footnotes were excised) (https://avalon.law.yale.edu/subject_menus/debcont.asp.). Second, slight modifications were made to it, largely in light of the version of Madison's *Notes* found in Max Farrand's *The Records of the Federal Convention of 1787* (https://oll.libertyfund.org/titles/farrand-the-records-of-the-federal-convention-of-1787-3vols). Third, two days are not included: June 8, 1787, when, evidently with little and perhaps no debate, all but two states voted to assign the following day for a reconsideration of the national executive's mode of appointment (https://avalon.law.yale.edu/18th_century/debates_608.asp.) and July 18, 1787, when the convention passed a motion which fixed the following day for a reconsideration of a previous vote which established that a person could serve only one term as the national executive (https://avalon.law.yale.edu/18th_century/debates_718.asp). Fourth, a four-dot ellipsis (i.e., "....") signifies excised material from Madison's *Notes* (i.e., debates which did not directly concern the national executive's appointment).

Resources 32-46, fifteen state maps, offer a cartological overview of the subject (i.e., they reveal the geographic distribution of the Constitution's proponents and opponents, as evidenced by delegates' votes on it at each state's ratifying convention). Resource 47 catalogues the constitutional amendments which each state ratifying convention recommended and identifies those which ultimately became Amendments I-X (i.e., the "Bill of Rights").

The third set of resources showcase the two issues which most-influenced the early evolution of the United States' presidential election system. In Resource 48, Thomas Jefferson discusses how states appoint electors, focusing particularly on the proliferation of winner-take-all systems in the 1790s. In Resource 49, James A. Bayard discusses the 1800 presidential election and the crisis-inducing consequences of having electors cast two ballots for president. Resource 50 (Amendment XII) reflects the changes which were made—and not made—to the United States' presidential election system in 1804.

Collectively, the resources address multiple subjects, present multiple perspectives on them, and provide multiple ways to examine them; as such, they are offered as tools to promote understanding of the United States' presidential election system.

Resource 1

May 29, 1787 Constitutional Convention

Tuesday May 29, 1787

John Dickenson, and Elbridge Gerry, the former from Delaware, the latter from Massts. took their seats. The following rules were added, on the report of Mr. Wythe from the Committee-

Additional rules. That no member be absent from the House, so as to interrupt the representation of the State, without leave.

That Committees do not sit whilst the House shall be or ought to be, sitting.

That no copy be taken of any entry on the journal during the sitting of the House without leave of the House.

That members only be permitted to inspect the journal.

That nothing spoken in the House be printed, or otherwise published or communicated without leave.

That a motion to reconsider a matter which had been determined by a majority, may be made, with leave unanimously given, on the same day on which the vote passed; but otherwise not without one day's previous notice: in which last case, if the House agree to the reconsideration, some future day shall be assigned for the purpose.

Mr. C. PINKNEY moved that a Committee be appointed to superintend the Minutes.

Mr. Govr. MORRIS objected to it. The entry of the proceedings of the Convention belonged to the Secretary as their impartial officer. A committee might have an interest & bias in moulding the entry according to their opinions and wishes.

The motion was negatived, 5 noes, 4 ays.

Mr. RANDOLPH then opened the main business.

….

Resolutions proposed by Mr. Randolph in Convention May 29, 1787

….

1. Resolved that the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, "common defence, security of liberty and general welfare."

….

7. Resd. that a National Executive be instituted; to be chosen by the National Legislature for the term of ----- years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.

….

12. Resd. that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the articles of Union shall be adopted, and for the completion of all their engagements.

13. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.

….

15. Resd. that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon.

He concluded with an exhortation, not to suffer the present opportunity of establishing general peace, harmony, happiness and liberty in the U. S. to pass away unimproved.

It was then Resolved—That the House will tomorrow resolve itself into a Committee of the Whole House to consider of the state of the American Union — and that the propositions moved by Mr. Randolph be referred to the said Committee.

Mr. CHARLES PINKNEY laid before the house the draft of a federal Government which he had prepared, to be agreed upon between the free and independent States of America. —Mr. P. plan ordered that the same be referred to the Committee of the Whole appointed to consider the state of the American Union.

adjourned.

Resource 2

May 30, 1787 Constitutional Convention

Wednesday May 30, 1787

Roger Sherman (from Connecticut) took his seat.

The House went into Committee of the Whole on the State of the Union. Mr. Gorham was elected to the Chair by Ballot.

The propositions of Mr. RANDOLPH which had been referred to the Committee being taken up. He moved on the suggestion of Mr. G. Morris, that the first of his propositions to wit "Resolved that the articles of Confederation ought to be so corrected & enlarged, as to accomplish the objects proposed by their institution; namely, common defence, security of liberty & general welfare["]: -should be postponed, in order to consider the 3 following:

1. that a Union of the States merely federal will not accomplish the objects proposed by the articles of Confederation, namely common defence, security of liberty, & genl. welfare.

2. that no treaty or treaties among the whole or part of the States, as individual Sovereignties, would be sufficient.

3. that a national Government ought to be established consisting of a supreme Legislative, Executive & Judiciary.

The motion for postponing was seconded by Mr. Govr. MORRIS and unanimously agreed to.

Some verbal criticisms were raised agst. the first proposition, and it was agreed on motion of Mr. BUTLER seconded by Mr. RANDOLPH, to pass on to the third, which underwent a discussion, less however on its general merits than on the force and extent of the particular terms national & supreme.

….

It was moved by Mr. READ 2ded. by Mr. Chas. COTESWORTH PINKNEY, to postpone the 3d. proposition last offered by Mr. Randolph viz ["]that a national Government ought to be established consisting of a supreme Legislative Executive and Judiciary," in order to take up the following-viz. "Resolved that in order to carry into execution the Design of the States in forming this Convention, and to accomplish the objects proposed by the Confederation a more effective Government consisting of a Legislative, Executive and Judiciary ought to be established."

The motion to postpone for this purpose was lost:

Yeas Massachusetts, Connecticut, Delaware, S. Carolina — 4
Nays N. Y. Pennsylvania, Virginia, North Carolina — 4.

On the question as moved by Mr. Butler, on the third proposition it was resolved in Committee of the whole ["]that a national governt. ought to be established consisting of a supreme Legislative Executive & Judiciary." Massts. being ay — Connect. no. N. York divided (Col. Hamilton ay Mr. Yates no) Pena. ay. Delaware ay. Virga. ay. N. C. ay. S. C. ay. [Ayes — 6; noes — 1; divided — 1.]
….

Resource 3

June 1, 1787 Constitutional Convention

Friday June 1, 1787

William Houston from Georgia took his seat.

The Committee of the whole proceeded to Resolution 7. "that a national Executive be instituted, to be chosen by the national Legislature-for the term of ------ years &c to be ineligible thereafter, to possess the executive powers of Congress &c."

Mr. PINKNEY was for a vigorous Executive but was afraid the Executive powers of the existing Congress might extend to peace & war &c., which would render the Executive a monarchy, of the worst kind, to wit an elective one.

Mr. WILSON moved that the Executive consist of a single person.

Mr. C PINKNEY seconded the motion, so as to read "that a National Ex. to consist of a single person, be instituted.["]

A considerable pause ensuing and the Chairman asking if he should put the question, Docr. FRANKLIN observed that it was a point of great importance and wished that the gentlemen would deliver their sentiments on it before the question was put.

Mr. RUTLIDGE animadverted on the shyness of gentlemen on this and other subjects. He said it looked as if they supposed themselves precluded by having frankly disclosed their opinions from afterwards changing them, which he did not take to be at all the case. He said he was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace. A single man would feel the greatest responsibility and administer the public affairs best.

Mr. SHERMAN said he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons ought to be appointed by and accountable to the Legislature only, which was the

depositary of the supreme will of the Society. As they were the best judges of the business which ought to be done by the Executive department, and consequently of the number necessary from time to time for doing it, he wished the number might not be fixed but that the legislature should be at liberty to appoint one or more as experience might dictate.

Mr. WILSON preferred a single magistrate, as giving most energy dispatch and responsibility to the office. He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not appertaining to and appointed by the Legislature.

Mr. GERRY favored the policy of annexing a Council to the Executive in order to give weight & inspire confidence.

Mr. RANDOLPH strenuously opposed a unity in the Executive magistracy. He regarded it as the foetus of monarchy. We had he said no motive to be governed by the British Governmt. as our prototype. He did not mean however to throw censure on that Excellent fabric. If we were in a situation to copy it he did not know that he should be opposed to it; but the fixt genius of the people of America required a different form of Government. He could not see why the great requisites for the Executive department, vigor, despatch & responsibility could not be found in three men, as well as in one man. The Executive ought to be independent. It ought therefore in order to support its independence to consist of more than one.

Mr. WILSON said that unity in the Executive instead of being the fetus of monarchy would be the best safeguard against tyranny. He repeated that he was not governed by the British Model which was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it. Mr. Wilson's motion for a single magistrate was postponed by common consent, the Committee seeming unprepared for any decision on it; and the first part of the clause agreed to, viz—"that a National Executive be instituted."

Mr. MADISON thought it would be proper, before a choice shd. be made between a unity and a plurality in the Executive, to

fix the extent of the Executive authority; that as certain powers were in their nature Executive, and must be given to that departmt. whether administered by one or more persons, a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer. He accordingly moved that so much of the clause before the Committee as related to the powers of the Executive shd. be struck out & that after the words "that a national Executive ought to be instituted" there be inserted the words following viz. "with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers["] "not Legislative nor Judiciary in their nature," ["]as may from time to time be delegated by the national Legislature." The words "not legislative nor judiciary in their nature" were added to the proposed amendment in consequence of a suggestion by Genl. Pinkney that improper powers might otherwise be delegated.

Mr. WILSON seconded this motion-

Mr. PINKNEY moved to amend the amendment by striking out the last member of it; viz: "and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated." He said they were unnecessary, the object of them being included in the "power to carry into effect the national laws."

Mr. RANDOLPH seconded the motion.

Mr. MADISON did not know that the words were absolutely necessary, or even the preceding words—"to appoint to offices &c.["] the whole being perhaps included in the first member of the proposition. He did not however see any inconveniency in retaining them, and cases might happen in which they might serve to prevent doubts and misconstructions.

In consequence of the motion of Mr. Pinkney, the question on Mr. Madison's motion was divided; and the words objected to by Mr. Pinkney struck out; by the votes of Connecticut, N. Y. N. J. Pena. Del. N. C. & Geo. agst. Mass. Virga. & S. Carolina[.] the preceding part of the motion being first agreed to: Connecticut divided, all the other States in the affirmative.

The next clause in Resolution 7, relating to the mode of appointing, & the duration of, the Executive being under consideration,

Mr. WILSON said he was almost unwilling to declare the mode which he wished to take place, being apprehensive that it might appear chimerical. He would say however at least that in theory he was for an election by the people. Experience, particularly in N. York & Massts., shewed that an election of the first magistrate by the people at large, was both a convenient & successful mode. The objects of choice in such cases must be persons whose merits have general notoriety.

Mr. SHERMAN was for the appointment by the Legislature, and for making him absolutely dependent on that body, as it was the will of that which was to be executed. An independence of the Executive on the supreme Legislature, was in his opinion the very essence of tyranny if there was any such thing.

Mr. WILSON moves that the blank for the term of duration should be filled with three years, observing at the same time that he preferred this short period, on the supposition that a reeligibility would be provided for.

Mr. PINKNEY moves for seven years.

Mr. SHERMAN was for three years, and agst. the doctrine of rotation as throwing out of office the men best qualifyed to execute its duties.

Mr. MASON was for seven years at least, and for prohibiting a re-eligibility as the best expedient both for preventing the effect of a false complaisance on the side of the Legislature towards unfit characters; and a temptation on the side of the Executive to intrigue with the Legislature for a re-appointment.

Mr. BEDFORD was strongly opposed to so long a term as seven years. He begged the committee to consider what the situation of the Country would be, in case the first magistrate should be saddled on it for such a period and it should be found on trial that he did not possess the qualifications ascribed to him, or should lose them after his appointment. An impeachment he said would be no cure for this evil, as an impeachment would reach misfeasance only, not incapacity. He was for a triennial election, and for an ineligibility after a period of nine years.

On the question for seven years,

Massts. dividd. Cont. no. N. Y. ay. N. J. ay. Pena. ay. Del. ay. Virga. ay. N. C. no. S. C. no. Geor. no.

There being Ayes—5, Noes—4, divded—1,

a question was asked whether a majority had voted in the affirmative? The President decided that it was an affirmative vote.

The *mode of appointing* the Executive was the next question.

Mr. WILSON renewed his declarations in favor of an appointment by the people. He wished to derive not only both branches of the Legislature from the people, without the intervention of the State Legislatures but the Executive also; in order to make them as independent as possible of each other, as well as of the States;

Col. MASON favors the idea, but thinks it impracticable. He wishes however that Mr. Wilson might have time to digest it into his own form.-the clause "to be chosen by the National Legislature"-was accordingly postponed.-

Mr. RUTLIDGE suggests an election of the Executive by the second branch only of the national Legislature.

The Committee then rose and the House

Adjourned.

Resource 4

June 2, 1787 Constitutional Convention

Saturday June 2, 1787
IN COMMITTEE OF WHOLE

William Saml. Johnson from Connecticut, Daniel of St. Thomas Jennifer, from Maryd. & John Lansing Jr. from N. York, took their seats.

It was movd. & 2ded. to postpone ye Resol: of Mr. Randolph respecting the Executive, in order to take up the 2d. branch of the Legislature; which being negatived by Mas: Con: Del: Virg: N. C. S. C. Geo: agst. N. Y. Pena. Maryd. The mode of appointg ye Executive was resumed.

Mr. WILSON made the following motion, to be substituted for the mode proposed by Mr. Randolph's resolution, "that the Executive Magistracy shall be elected in the following manner: That the States be divided into -------- districts: & that the persons qualified to vote in each district for members of the first branch of the national Legislature elect -------- members for their respective districts to be electors of the Executive magistracy, that the said Electors of the Executive magistracy meet at -------- and they or any -------- of them so met shall proceed to elect by ballot, but not out of their own body -------- person in whom the Executive authority of the national Government shall be vested."

Mr. WILSON repeated his arguments in favor of an election without the intervention of the States. He supposed too that this mode would produce more confidence among the people in the first magistrate, than an election by the national Legislature.

Mr. GERRY, opposed the election by the national legislature. There would be a constant intrigue kept up for the appointment. The Legislature & the candidates wd. bargain & play into one an-

other's hands, votes would be given by the former under promises or expectations from the latter, of recompensing them by services to members of the Legislature or to their friends. He liked the principle of Mr. Wilson's motion, but fears it would alarm & give a handle to the State partisans, as tending to supersede altogether the State authorities. He thought the Community not yet ripe for stripping the States of their powers, even such as might not be requisite for local purposes. He was for waiting till people should feel more the necessity of it. He seemed to prefer the taking the suffrages of the States instead of Electors, or letting the Legislatures nominate, and the electors appoint. He was not clear that the people ought to act directly even in the choice of electors, being too little informed of personal characters in large districts, and liable to deceptions.

Mr. WILLIAMSON could see no advantage in the introduction of Electors chosen by the people who would stand in the same relation to them as the State Legislatures, whilst the expedient would be attended with great trouble and expence. On the question for agreeing to Mr. Wilson's substitute, it was negatived: Massts. no. Cont. no. N. Y. no. Pa. ay. Del. no. Mard. ay. Virga. no. N. C. no. S. C. no. Geoa. no. [Ayes—2; noes—8.]

On the question for electing the Executive by the national Legislature for the term of seven years, it was agreed to Massts. ay. Cont. ay. N. Y. ay. Pena. no. Del. ay. Maryd. no. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes—8; noes—2.]

....

The Question for making ye. Executive ineligible after seven years, was next taken, and agreed to:

Massts.; ay. Cont.; no. N. Y. ay. Pa. divd. Del. ay. Maryd. ay. Va. ay. N. C. ay. S. C. ay. Geo. no: [Ayes—7; noes—2; divided—1.]

Mr. WILLIAMSON 2ded. by Mr. DAVIE moved to add to the last Clause, the words- "and to be removeable on impeachment & conviction of mal-practice or neglect of duty"-which was agreed to.

Mr. RUTLIDGE & Mr. C. PINKNEY moved that the blank for the no. of persons in the Executive be filled with the words "one person." He supposed the reasons to be so obvious

& conclusive in favor of one that no member would oppose the motion.

Mr. RANDOLPH opposed it with great earnestness, declaring that he should not do justice to the Country which sent him if he were silently to suffer the establishmt. of a Unity in the Executive department. He felt an opposition to it which he believed he should continue to feel as long as he lived. He urged 1. that the permanent temper of the people was adverse to the very semblance of Monarchy. 2. that a unity was unnecessary a plurality being equally competent to all the objects of the department. 3. that the necessary confidence would never be reposed in a single Magistrate. 4. that the appointments would generally be in favor of some inhabitant near the center of the Community, and consequently the remote parts would not be on an equal footing. He was in favor of three members of the Executive to be drawn from different portions of the Country.

Mr. BUTLER contended strongly for a single magistrate as most likely to answer the purpose of the remote parts. If one man should be appointed he would be responsible to the whole, and would be impartial to its interests. If three or more should be taken from as many districts, there would be a constant struggle for local advantages. In Military matters this would be particularly mischievous. He said his opinion on this point had been formed under the opportunity he had had of seeing the manner in which a plurality of military heads distracted Holland when threatened with invasion by the imperial troops. One man was for directing the force to the defence of this part, another to that part of the Country, just as he happened to be swayed by prejudice or interest.

The motion was then postpd. the Committee rose & the House Adjd.

Resource 5

June 4, 1787 Constitutional Convention

Monday June 4, 1787
IN COMMITTEE OF THE WHOLE

The Question was resumed on motion of Mr. PINKNEY 2ded. by WILSON, "shall the blank for the number of the Executive be filled with a single person?"

Mr. WILSON was in favor of the motion. It had been opposed by the gentleman from Virga. (Mr. Randolph) but the arguments used had not convinced him. He observed that the objections of Mr. R. were levelled not so much agst. the measure itself, as agst. its unpopularity. If he could suppose that it would occasion a rejection of the plan of which it should form a part, though the part was an important one, yet he would give it up rather than lose the whole. On examination he could see no evidence of the alledged antipathy of the people. On the contrary he was persuaded that it does not exist. All know that a single magistrate is not a King. One fact has great weight with him. All the 13 States tho agreeing in scarce any other instance, agree in placing a single magistrate at the head of the Governt. The idea of three heads has taken place in none. The degree of power is indeed different; but there are no co-ordinate heads. In addition to his former reasons for preferring a unity, he would mention another. The tranquility not less than the vigor of the Govt. he thought would be favored by it. Among three equal members, he foresaw nothing but uncontrouled, continued, & violent animosities; which would not only interrupt the public administration; but diffuse their poison thro' the other branches of Govt., thro' the States, and at length thro' the people at large. If the members were to be unequal in power the principle of the opposition to the unity was given up. If equal, the making them an odd number would not be a remedy. In Courts of Justice there

are two sides only to a question. In the Legislative & Executive departmts. questions have commonly many sides. Each member therefore might espouse a separate one & no two agree.

Mr. SHERMAN. This matter is of great importance and ought to be well considered before it is determined. Mr. Wilson he said had observed that in each State a single magistrate was placed at the head of the Govt. It was so he admitted, and properly so, and he wished the same policy to prevail in the federal Govt. But then it should be also remarked that in all the States there was a Council of advice, without which the first magistrate could not act. A council he thought necessary to make the establishment acceptable to the people. Even in G. B. the King has a Council; and though he appoints it himself, its advice has its weight with him, and attracts the Confidence of the people.

Mr. WILLIAMSON asks Mr. WILSON whether he means to annex a Council.

Mr. WILSON means to have no Council, which oftener serves to cover, than prevent malpractices.

Mr. GERRY was at a loss to discover the policy of three members for the Executive. It Wd. be extremely inconvenient in many instances, particularly in military matters, whether relating to the militia, an army, or a navy. It would be a general with three heads.

On the question for a single Executive it was agreed to Massts. ay. Cont. ay. N. Y. no. Pena. ay. Del. no. Maryd. no. Virg. ay. (Mr. R. & Mr. Blair no—Docr. Mc.Cg. Mr. M. & Gen W. ay. Col. Mason being no, but not in house, Mr. Wythe ay but gone home). N. C. ay. S. C. ay. Georga ay. [Ayes—7; noes—3.]

....

Resource 6

June 9, 1787 Constitutional Convention

Saturday June 9, 1787
(MR. LUTHER MARTIN FROM MARYLAND TOOK HIS SEAT) IN COMMITTEE OF THE WHOLE

Mr. GERRY, according to previous notice given by him, moved "that the National Executive should be elected by the Executives of the States whose proportion of votes should be the same with that allowed to the States in the election of the Senate." If the appointmt. should be made by the Natl. Legislature, it would lessen that independence of the Executive which ought to prevail, would give birth to intrigue and corruption between the Executive & Legislature previous to the election, and to partiality in the Executive afterwards to the friends who promoted him. Some other mode therefore appeared to him necessary. He proposed that of appointing by the State Executives as most analogous to the principle observed in electing the other branches of the Natl. Govt.; the first branch being chosen by the people of the States, & the 2d. by the Legislatures of the States; he did not see any objection agst. letting the Executive be appointed by the Executives of the States. He supposed the Executives would be most likely to select the fittest men, and that it would be their interest to support the man of their own choice.

Mr. RANDOLPH urged strongly the inexpediency of Mr. Gerry's mode of appointing the Natl. Executive. The confidence of the people would not be secured by it to the Natl. magistrate. The small States would lose all chance of an appointmt. from within themselves. Bad appointments would be made; the Executives of the States being little conversant with characters not within their own small spheres. The State Executives too notwithstanding their constitutional independence, being in fact dependent on the State

Legislatures will generally be guided by the views of the latter, and prefer either favorites within the States, or such as it may be expected will be most partial to the interests of the State. A Natl. Executive thus chosen will not be likely to defend with becoming vigilance & firmness the National rights agst. State encroachments. Vacancies also must happen. How can these be filled? He could not suppose either that the Executives would feel the interest in supporting the Natl. Executive which had been imagined. They will not cherish the great Oak which is to reduce them to paltry shrubs.

On the question for referring the appointment of the Natl. Executive to the State Executives as propd. by Mr. Gerry Massts. no. Cont. no. N. Y. no. N. J. no. Pa. no. Del. divd. Md. no. Va. no. S. C. no. Geo. no. [Ayes — 0; noes — 9; divided — 1.]

….

Resource 7

June 13, 1787 Constitutional Convention

Wednesday June 13, 1787
IN COMMITTEE OF THE WHOLE

….
Committee rose & Mr. GHORUM made report, which was postponed till tomorrow, to give an opportunity for other plans to be proposed. The report was in the words following:

REPORT OF THE COMMITTEE OF WHOLE ON Mr. RANDOLPH'S PROPOSITIONS
….
1. Resd. that it is the opinion of this Committee that a National Governmt. ought to be established, consisting of a supreme Legislative, Executive & Judiciary.
….
9. Resolved that a National Executive be instituted to consist of a single person, to be chosen by the Natl. Legislature for the term of seven years, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for—to be ineligible a second time, & to be removeable on impeachment and conviction of malpractices or neglect of duty—to receive a fixed stipend by which he may be compensated for the devotion of his time to public service to be paid out of the national Treasury.
….
15. Resd. that provision ought to be made for the continuance of Congress and their authorities and privileges untill a given day after the reform of the articles of Union shall be adopted and for the completion of all their engagements.
….

17. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary.

….

19. Resd. that the amendments which shall be offered to the confederation by the Convention ought at a proper time or times after the approbation of Congs. to be submitted to an Assembly or Assemblies recommended by the several Legislatures to be expressly chosen by the people to consider and decide thereon.

Resource 8

June 15, 1787 Constitutional Convention

Friday June 15, (1787)

Mr. PATTERSON, laid before the Convention the plan which he said several of the deputations wished to be substituted in place of that proposed by Mr. Randolph. After some little discussion of the most proper mode of giving it a fair deliberation it was agreed that it should be referred to a Committee of the Whole, and that in order to place the two plans in due comparison, the other should be recommitted. At the earnest desire of Mr. Lansing & some other gentlemen, it was also agreed that the Convention should not go into Committee of the whole on the subject till tomorrow, by which delay the friends of the plan proposed by Mr. Patterson wd. be better prepared to explain & support it, and all would have an opportuy. of taking copies.

The propositions from N. Jersey moved by Mr. Patterson were in the words following.

….

1. Resd. that the articles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union.

….

4. Resd. that the U. States in Congs. be authorized to elect a federal Executive to consist of ------ persons, to continue in office for the term of ------ years, to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons composing the Executive at the time of such increase or diminution, to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service and for ------ years

thereafter; to be ineligible a second time, & removeable by Congs. on application by a majority of the Executives of the several States; that the Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, & to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General or in other capacity.

….

Resource 9

June 18, 1787 Constitutional Convention

Monday June 18, 1787.
IN COMMITTEE OF THE WHOLE. ON THE PROPOSITIONS OF Mr. PATTERSON & Mr. RANDOLPH

On motion of Mr. DICKINSON to postpone the 1st. Resolution in Mr. Patterson's plan, in order to take up the following viz—"that the articles of confederation ought to be revised and amended, so as to render the Government of the U.S. adequate to the exigences, the preservation and the prosperity of the Union." the postponement was agreed to by 10 States, Pen: divided.

Mr. HAMILTON….As to the Executive, it seemed to be admitted that no good one could be established on Republican principles. Was not this giving up the merits of the question: for can there be a good Govt. without a good Executive. The English model was the only good one on this subject. The Hereditary interest of the King was so interwoven with that of the Nation, and his personal emoluments so great, that he was placed above the danger of being corrupted from abroad—and at the same time was both sufficiently independent and sufficiently controuled, to answer the purpose of the institution at home. one of the weak sides of Republics was their being liable to foreign influence & corruption. Men of little character, acquiring great power become easily the tools of intermedling neibours. Sweeden was a striking instance. The French & English had each their parties during the late Revolution which was effected by the predominant influence of the former. What is the inference from all these observations? That we ought to go as far in order to attain stability and permanency, as republican principles will admit. Let one branch of the Legislature hold their places for life or at least during good behaviour. Let the Executive also be for life. He appealed to the feelings of the members present whether a term of seven years, would induce

the sacrifices of private affairs which an acceptance of public trust would require, so so as to ensure the services of the best Citizens. On this plan we should have in the Senate a permanent will, a weighty interest, which would answer essential purposes. But is this a Republican Govt., it will be asked? Yes if all the Magistrates are appointed, and vacancies are filled, by the people, or a process of election originating with the people. He was sensible that an Executive constituted as he proposed would have in fact but little of the power and independence that might be necessary. On the other plan of appointing him for 7 years, he thought the Executive ought to have but little power. He would be ambitious, with the means of making creatures; and as the object of his ambition wd. be to *prolong* his power, it is probable that in case of a war, he would avail himself of the emergence, to evade or refuse a degradation from his place. An Executive for life has not this motive for forgetting his fidelity, and will therefore be a safer depository of power. It will be objected probably, that such an Executive will be an *elective Monarch*, and will give birth to the tumults which characterize that form of Govt. He wd. reply that *Monarch* is an indefinite term. It marks not either the degree or duration of power. If this Executive Magistrate wd. be a monarch for life—the other propd. by the Report from the Comtte of the whole, wd. be a monarch for seven years. The circumstance of being elective was also applicable to both. It had been observed by judicious writers that elective monarchies wd. be the best if they could be guarded agst. the *tumults* excited by the ambition and intrigues of competitors. He was not sure that tumults were an inseparable evil. He rather thought this character of Elective Monarchies had been taken rather from particular cases than from general principles. The election of Roman Emperors was made by the *Army*. In *Poland* the election is made by great rival *princes* with independent power, and ample means, of raising commotions. In the German Empire, the appointment is made by the Electors & Princes, who have equal motives & means, for exciting cabals & parties. Might not such a mode of election be devised among ourselves as will defend the community agst. these effects in any dangerous degree? Having made these observations he would read to the Committee a sketch of a plan which he shd.

prefer to either of those under consideration. He was aware that it went beyond the ideas of most members. But will such a plan be adopted out of doors? In return he would ask will the people adopt the other plan? At present they will adopt neither. But he sees the Union dissolving or already dissolved—he sees evils operating in the States which must soon cure the people of their fondness for democracies—he sees that a great progress has been already made & is still going on in the public mind. He thinks therefore that the people will in time be unshackled from their prejudices; and whenever that happens, they will themselves not be satisfied at stopping where the plan of Mr. R. wd. place them, but be ready to go as far at least as he proposes. He did not mean to offer the paper he had sketched as a proposition to the Committee. It was meant only to give a more correct view of his ideas, and to suggest the amendments which he should probably propose to the plan of Mr. R. in the proper stages of its future discussion. He read his sketch in the words following: to wit

….

IV. The supreme Executive authority of the United States to be vested in a Governour to be elected to serve during good behaviour—the election to be made by Electors chosen by the people in the Election Districts aforesaid—The authorities & functions of the Executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed, to have the direction of war when authorized or begun; to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate; to have the power of pardoning all offences except Treason; which he shall not pardon without the approbation of the Senate.

V. On the death, resignation or removal of the Governour his authorities to be exercised by the President of the Senate till a Successor be appointed.

….

IX. The Governour Senators and all officers of the United States to be liable to impeachment for mal- and corrupt conduct; and upon conviction to be removed from office, & disqualified for holding any place of trust or profit—all impeachments to be tried by a Court to consist of the Chief or Judge of the superior Court of Law of each State, provided such Judge shall hold his place during good behavior, and have a permanent salary.

….

Resource 10

July 17, 1787 Constitutional Convention

Tuesday, July 17, 1787
IN CONVENTION

....
9th Resol: "that Natl. Executive consist of a single person." Agd. to nem. con.

"To be chosen by the National Legisl:"

Mr. GOVERNR. MORRIS was pointedly agst. his being so chosen. He will be the mere creature of the Legisl: if appointed & impeachable by that body. He ought to be elected by the people at large, by the freeholders of the Country. That difficulties attend this mode, he admits. But they have been found superable in N. Y. & in Cont. and would he believed be found so, in the case of an Executive for the U. States. If the people should elect, they will never fail to prefer some man of distinguished character, or services; some man, if he might so speak, of continental reputation. If the Legislature elect, it will be the work of intrigue, of cabal, and of faction; it will be like the election of a pope by a conclave of cardinals; real merit will rarely be the title to the appointment. He moved to strike out "National Legislature" & insert "citizens of U.S."

Mr. SHERMAN thought that the sense of the Nation would be better expressed by the Legislature, than by the people at large. The latter will never be sufficiently informed of characters, and besides will never give a majority of votes to any one man. They will generally vote for some man in their own State, and the largest State will have the best chance for the appointment. If the choice be made by the Legislre. A majority of voices may be made necessary to constitute an election.

Mr. WILSON. two arguments have been urged agnt. an election of the Executive Magistrate by the people. 1 the example of Poland where an Election of the supreme Magistrate is attended with the most dangerous commotions. The cases he observed were totally dissimilar. The Polish nobles have resources & dependents which enable them to appear in force, and to threaten the Republic as well as each other. In the next place the electors all assemble in one place: which would not be the case with us. The 2d. argt. is that a *majority* of the people would never concur. It might be answered that the concurrence of a majority of people is not a necessary principle of election, nor required as such in any of the States. But allowing the objection all its force, it may be obviated by the expedient used in Masts. where the Legislature by majority of voices, decide in case a majority of people do not concur in favor of one of the candidates. This would restrain the choice to a good nomination at least, and prevent in a great degree intrigue & cabal. A particular objection with him agst. an absolute election by the Legislre. was that the Exec: in that case would be too dependent to stand the mediator between the intrigues & sinister views of the Representatives and the general liberties & interests of the people.

Mr. PINKNEY did not expect this question would again have been brought forward; An Election by the people being liable to the most obvious & striking objections. They will be led by a few active & designing men. The most populous States by combining in favor of the same individual will be able to carry their points. The Natl. Legislature being most immediately interested in the laws made by themselves, will be most attentive to the choice of a fit man to carry them properly into execution.

Mr. Govr. MORRIS. It is said that in case of an election by the people the populous States will combine & elect whom they please. Just the reverse. The people of such States cannot combine. If their be any combination it must be among their representatives in the Legislature. It is said the people will be led by a few designing men. This might happen in a small district. It can never happen throughout the continent. In the election of a Govr. of N. York, it sometimes is the case in particular spots, that the activity & intrigues of little partizans are successful, but the general voice

of the State is never influenced by such artifices. It is said the multitude will be uninformed. It is true they would be uninformed of what passed in the Legislative Conclave, if the election were to be made there; but they will not be uninformed of those great & illustrious characters which have merited their esteem & confidence. If the Executive be chosen by the Natl. Legislature, he will not be independent on it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence. This was the case in England in the last Century. It has been the case in Holland, where their Senates have engrossed all power. It has been the case every where. He was surprised that an election by the people at large should ever have been likened to the polish election of the first Magistrate. An election by the Legislature will bear a real likeness to the election by the Diet of Poland. The great must be the electors in both cases, and the corruption & cabal wch. are known to characterise the one would soon find their way into the other. Appointments made by numerous bodies, are always worse than those made by single responsible individuals, or by the people at large.

Col. MASON. It is curious to remark the different language held at different times. At one moment we are told that the Legislature is entitled to thorough confidence, and to indifinite power. At another, that it will be governed by intrigue & corruption, and cannot be trusted at all. But not to dwell on this inconsistency he would observe that a Government which is to last ought at least to be practicable. Would this be the case if the proposed election should be left to the people at large. He conceived it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.

Mr. WILSON. could not see the contrariety stated (by Col. Mason) The Legislre. might deserve confidence in some respects, and distrust in others. In acts which were to affect them & yr. Constituents precisely alike confidence was due. In others jealousy was warranted. The appointment to great offices, where the Legislre.

might feel many motives, not common to the public confidence was surely misplaced. This branch of business it was notorious was most corruptly managed of any that had been committed to legislative bodies.

Mr. WILLIAMSON, conceived that there was the same difference between an election in this case, by the people and by the legislature, as between an appt. by lot, and by choice. There are at present distinguished characters, who are known perhaps to almost every man. This will not always be the case. The people will be sure to vote for some man in their own State, and the largest State will be sure to succeed. This will not be Virga. however. Her slaves will have no suffrage. As the Salary of the Executive will be fixed, and he will not be eligible a 2d. time, there will not be such a dependence on the Legislature as has been imagined.

Question on an election by the people instead of the Legislature; which passed in the negative.

Mas. no. Cont. no. N. J. no. Pa. ay. Del. no. Md. no. Va. no. N.C. no. S.C. no. Geo. no. [Ayes—1; noes—9.]

Mr. L. MARTIN moved that the Executive be chosen by Electors appointed by the several Legislatures of the individual States.

Mr. BROOME 2ds. On the Question, it passed in the negative.

Mas. no. Cont. no. N. J. no. Pa. no. Del. ay. Md. ay. Va. no. N.C. no. S.C. no. Geo. no. [Ayes—2; noes—8.]

On the question on the words "to be chosen by the Nationl. Legislature" it passed unanimously in the affirmative.

"For the term of seven years"—postponed nem. con. on motion of Mr. Houston & Gov. Morris.

"to carry into execution the nationl. laws"—agreed to nem. con.

"to appoint to offices in cases not otherwise provided for."—agreed to nem.con.

"to be ineligible a second time"—

Mr. HOUSTON moved to strike out this clause.

Mr. SHERMAN 2ds. the motion.

Mr. Govr. MORRIS espoused the motion. The ineligibility proposed by the clause as it stood tended to destroy the great motive to good behavior, the hope of being rewarded by a re-appointment. It was saying to him, make hay while the sun shines.

On the question for striking out as moved by Mr. Houston, it passed in the affirmative.

Mas. ay. Cont. ay. N. J. ay. Pa. ay. Del. no. Md. ay. Va. no. N. C. no. S.C. no. Geo. ay. [Ayes—6; noes—4.]

"For the term of 7 years" resumed

Mr. BROOM was for a shorter term since the Executive Magistrate was now to be re-eligible. Had he remained ineligible a 2d. time, he should have preferred a longer term.

Docr. Mc.CLURG moved to strike out 7 years, and insert "during good behavior." By striking out the words declaring him not re-eligible, he was put into a situation that would keep him dependent for ever on the Legislature; and he conceived the independence of the Executive to be equally essential with that of the Judiciary department.

Mr. Govr. MORRIS 2ded. the motion. He expressed great pleasure in hearing it. This was the way to get a good Government. His fear that so valuable an ingredient would not be attained had led him to take the part he had done. He was indifferent how the Executive should be chosen, provided he held his place by this tenure.

Mr. BROOME highly approved the motion. It obviated all his difficulties.

Mr. SHERMAN considered such a tenure as by no means safe or admissible. As the Executive Magistrate is now re-eligible, he will be on good behavior as far as will be necessary. If he behaves well he will be continued; if otherwise, displaced, on a succeeding election.

Mr. MADISON If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other. The Executive could not be independent of the Legislure, if dependent on the pleasure of that branch for a reappointment. Why was it determined that the Judges should not

hold their places by such a tenure? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well the maker of the laws. In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner. There was an analogy between the Executive & Judiciary departments in several respects. The latter executed the laws in certain cases as the former did in others. The former expounded & applied them for certain purposes, as the latter did for others. The difference between them seemed to consist chiefly in two circumstances—1. the collective interest & security were much more in the power belonging to the Executive than to the Judiciary department. 2. in the administration of the former much greater latitude is left to opinion and discretion than in the administration of the latter. But if the 2d. consideration proves that it will be more difficult to establish a rule sufficiently precise for trying the Execut: than the Judges, & forms an objection to the same tenure of office, both considerations prove that it might be more dangerous to suffer a union between the Executive & Legisl: powers, than between the Judiciary & Legislative powers. He conceived it to be absolutely necessary to a well constituted Republic that the two first shd. be kept distinct & independent of each other. Whether the plan proposed by the motion was a proper one was another question, as it depended on the practicability of instituting a tribunal for impeachmts. as certain & as adequate in the one case as in the other. On the other hand, respect for the mover entitled his proposition to a fair hearing & discussion, until a less objectionable expedient should be applied for guarding agst. a dangerous union of the Legislative & Executive departments.

Col. MASON. This motion was made some time ago, & negatived by a very large majority. He trusted that it wd. be again negatived. It Wd. be impossible to define the misbehaviour in such a manner as to subject it to a proper trial; and perhaps still more impossible to compel so high an offender holding his office by such

a tenure to submit to a trial. He considered an Executive during good behavior as a softer name only for an Executive for life. And that the next would be an easy step to hereditary Monarchy. If the motion should finally succeed, he might himself live to see such a Revolution. If he did not it was probable his children or grand children would. He trusted there were few men in that House who wished for it. No state he was sure had so far revolted from Republican principles as to have the least bias in its favor.

Mr. MADISON, was not apprehensive of being thought to favor any step towards monarchy. The real object with him was to prevent its introduction. Experience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other would be inevitable. The preservation of Republican Govt. therefore required some expedient for the purpose, but required evidently at the same time that in devising it, the genuine principles of that form should be kept in view.

Mr. Govr. MORRIS was as little a friend to monarchy as any gentleman. He concurred in the opinion that the way to keep out monarchical Govt. was to establish such a Repub. Govt. as wd. make the people happy and prevent a desire of change.

Docr. Mc. CLURG was not so much afraid of the shadow of monarchy as to be unwilling to approach it; nor so wedded to Republican Govt. as not to be sensible of the tyrannies that had been & may be exercised under that form. It was an essential object with him to make the Executive independent of the Legislature; and the only mode left for effecting it, after the vote destroying his ineligibility a second time, was to appoint him during good behavior.

On the question for inserting "during good behavior" in place of 7 years (with a re-eligibility) it passed in the negative.

Mas. no. Ct. no. N.J. ay. Pa. ay. Del. ay. Md.no. Va. ay. N.C. no. S.C. no. Geo. no. [Ayes—4; noes—6.]

On the motion "to strike out seven years" it passed in the negative.

Mas. ay. Ct. no. N. J. no. Pa. ay. Del. ay. Md. no. Va. no. N. C. ay. S.C. no. Geo. no.

It was now unanimously agreed that the vote which had struck out the words "to be ineligible a second time" should be reconsidered tomorrow.

Adjd.

Resource 11

July 19, 1787 Constitutional Convention

Thursday July 19, 1787
IN CONVENTION

On reconsideration of the vote rendering the Executive re-eligible a 2d. time, Mr. MARTIN moved to reinstate the words, "to be ineligible a 2d. time."

Mr. GOVERNEUR MORRIS. It is necessary to take into one view all that relates to the establishment of the Executive; on the due formation of which must depend the efficacy & utility of the Union among the present and future States. It has been a maxim in Political Science that Republican Government is not adapted to a large extent of Country, because the energy of the Executive Magistracy can not reach the extreme parts of it. Our Country is an extensive one. We must either then renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it. This subject was of so much importance that he hoped to be indulged in an extensive view of it. One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny, against the Great & the wealthy who in the course of things will necessarily compose the Legislative body. Wealth tends to corrupt the mind & to nourish its love of power, and to stimulate it to oppression. History proves this to be the spirit of the opulent. The check provided in the 2d. branch was not meant as a check on Legislative usurpations of power, but on the abuse of lawful powers, on the propensity in the 1st. branch to legislate too much to run into projects of paper money & similar expedients. It is no check on Legislative tyranny. On the contrary

it may favor it, and if the 1st. branch can be seduced may find the means of success. The Executive therefore ought to be so constituted as to be the great protector of the Mass of the people. —It is the duty of the Executive to appoint the officers & to command the forces of the Republic: to appoint 1. ministerial officers for the administration of public affairs. 2. officers for the dispensation of Justice. Who will be the best Judges whether these appointments be well made? The people at large, who will know, will see, will feel the effects of them. Again who can judge so well of the discharge of military duties for the protection & security of the people, as the people themselves who are to be protected & secured? —He finds too that the Executive is not to be re-eligible. What effect will this have?

1. it will destroy the great incitement to merit public esteem by taking away the hope of being rewarded with a reappointment. It may give a dangerous turn to one of the strongest passions in the human breast. The love of fame is the great spring to noble & illustrious actions. Shut the Civil road to Glory & he may be compelled to seek it by the sword.

2. It will tempt him to make the most of the short space of time allotted him, to accumulate wealth and provide for his friends.

3. It will produce violations of the very constitution it is meant to secure. In moments of pressing danger the tried abilities and established character of a favorite Magistrate will prevail over respect for the forms of the Constitution. The Executive is also to be impeachable. This is a dangerous part of the plan. It will hold him in such dependence that he will be no check on the Legislature, will not be a firm guardian of the people and of the public interest. He will be the tool of a faction, of some leading demagogue in the Legislature. These then are the faults of the Executive establishment as now proposed. Can no better establishmt. be devised? If he is to be the Guardian of the people let him be appointed by the people? If he is to be a check on the Legislature let him not be impeachable. Let him be of short duration, that he may with propriety be re-eligible. It has been said that the candidates for this office will not be known to the people. If they be known to the Legislature, they must have such a notoriety and eminence of Character, that they can not possibly be unknown to the people at large. It cannot be possible that a man shall have sufficiently

distinguished himself to merit this high trust without having his character proclaimed by fame throughout the Empire. As to the danger from an unimpeachable magistrate he could not regard it as formidable. There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive, and will be amenable by impeachment to the public Justice. Without these ministers the Executive can do nothing of consequence. He suggested a biennial election of the Executive at the time of electing the 1st. branch, and the Executive to hold over, so as to prevent any interregnum in the administration. An election by the people at large throughout so great an extent of country could not be influenced, by those little combinations and those momentary lies which often decide popular elections within a narrow sphere. It will probably, be objected that the election will be influenced by the members of the Legislature; particularly of the 1st. branch, and that it will be nearly the same thing with an election by the Legislature itself. It could not be denied that such an influence would exist. But it might be answered that as the Legislature or the candidates for it would be divided, the enmity of one part would counteract the friendship of another: that if the administration of the Executive were good, it would be unpopular to oppose his reelection, if bad it ought to be opposed & a reappointmt. prevented; and lastly that in every view this indirect dependence on the favor of the Legislature could not be so mischievous as a direct dependence for his appointment. He saw no alternative for making the Executive independent of the Legislature but either to give him his office for life, or make him eligible by the people. —Again, it might be objected that two years would be too short a duration. But he believes that as long as he should behave himself well, he would be continued in his place. The extent of the Country would secure his re-election agst. the factions & discontents of particular States. It deserved consideration also that such an ingredient in the plan would render it extremely palatable to the people. These were the general ideas which occurred to him on the subject, and which led him to wish & move that the whole constitution of the Executive might undergo reconsideration.

Mr. RANDOLPH urged the motion of Mr. L. Martin for restoring the words making the Executive ineligible a 2d. time. If he

ought to be independent, he should not be left under a temptation to court a re-appointment. If he should be re-appointable by the Legislature, he will be no check on it. His revisionary power will be of no avail. He had always thought & contended as he still did that the danger apprehended by the little States was chimerical; but those who thought otherwise ought to be peculiarly anxious for the motion. If the Executive be appointed, as has been determined, by the Legislature, he will probably be appointed either by joint ballot of both houses, or be nominated by the 1st. and appointed by the 2d. branch. In either case the large States will preponderate. If he is to court the same influence for his re-appointment, will he not make his revisionary power, and all the other functions of his administration subservient to the views of the large States. Besides, is there not great reason to apprehend that in case he should be re-eligible, a false complaisance in the Legislature might lead them to continue an unfit man in office in preference to a fit one. It has been said that a constitutional bar to reappointment will inspire unconstitutional endeavours to perpetuate himself. It may be answered that his endeavours can have no effect unless the people be corrupt to such a degree as to render all precautions hopeless: to which may be added that this argument supposes him to be more powerful & dangerous, than other arguments which have been used, admit, and consequently calls for stronger fetters on his authority. He thought an election by the Legislature with an incapacity to be elected a second time would be more acceptable to the people that the plan suggested by Mr. Govr. Morris.

Mr. KING. did not like the ineligibility. He thought there was great force in the remark of Mr. Sherman, that he who has proved himself to be most fit for an Office, ought not to be excluded by the constitution from holding it. He would therefore prefer any other reasonable plan that could be substituted. He was much disposed to think that in such cases the people at large would chuse wisely. There was indeed some difficulty arising from the improbability of a general concurrence of the people in favor of any one man. On the whole he was of opinion that an appointment by electors chosen by the people for the purpose, would be liable to fewest objections.

Mr. PATTERSON's ideas nearly coincided he said with those of Mr. King. He proposed that the Executive should be ap-

pointed by Electors to be chosen by the States in a ratio that would allow one elector to the smallest and three to the largest States.

Mr. WILSON. It seems to be the unanimous sense that the Executive should not be appointed by the Legislature, unless he be rendered in-eligible a 2d. time: he perceived with pleasure that the idea was gaining ground, of an election mediately or immediately by the people.

Mr. MADISON. If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be separately exercised, it is equally so that they be independently exercised. There is the same & perhaps greater reason why the Executive shd. be independent of the Legislature, than why the Judiciary should: A coalition of the two former powers would be more immediately & certainly dangerous to public liberty. It is essential then that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the Legislature. This could not be if he was to be appointable from time to time by the Legislature. It was not clear that an appointment in the 1st. instance even with an eligibility afterwards would not establish an improper connection between the two departments. Certain it was that the appointment would be attended with intrigues and contentions that ought not to be unnecessarily admitted. He was disposed for these reasons to refer the appointment to some other source. The people at large was in his opinion the fittest in itself. It would be as likely as any that could be devised to produce an Executive Magistrate of distinguished Character. The people generally could only know & vote for some Citizen whose merits had rendered him an object of general attention & esteem. There was one difficulty however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to fewest objections.

Mr. GERRY. If the Executive is to be elected by the Legislature he certainly ought not to be re-eligible. This would make him absolutely dependent. He was agst. a popular election. The people are uninformed, and would be misled by a few designing

men. He urged the expediency of an appointment of the Executive by Electors to be chosen by the State Executives. The people of the States will then choose the 1st. branch: The legislatures of the States the 2d. branch of the National Legislature, and the Executives of the States, the National Executive. This he thought would form a strong attachnt. in the States to the National System. The popular mode of electing the chief Magistrate would certainly be the worst of all. If he should be so elected & should do his duty, he will be turned out for it like Govr. Bowdoin in Massts. & President Sullivan in N. Hamshire.

On the question on Mr. Govr. Morris motion to reconsider generally the constitution of the Executive.

Mas. ay. Ct. ay. N. J. ay & all the others ay.

Mr. ELSEWORTH moved to strike out the appointmt. by the Natl. Legislature, and insert "to be chosen by electors appointed, by the Legislatures of the States in the following ratio; to wit—one for each State not exceeding 200,000 inhabts. ["Journal gives this 100,000."] two for each above yt. number & not exceeding 300,000. and three for each State exceeding 300,000.["]

Mr. BROOME 2ded. the motion

Mr. RUTLIDGE was opposed to all the modes except the appointmt. by the Natl. Legislature. He will be sufficiently independent, if he be not re-eligible.

Mr. GERRY preferred the motion of Mr. Elseworth to an appointmt. by the Natl. Legislature, or by the people; tho' not to an appt. by the State Executives. He moved that the electors proposed by Mr. E. should be 25 in number, and allotted in the following proportion. to N. H. 1. to Mas. 3. to R. I. 1. to Cont. 2. to N. Y. 2. N. J. 2. Pa. 3. Del. 1. Md. 2. Va. 3. N. C. 2. S. C. 2. Geo. 1.

The question as moved by Mr. Elseworth being divided, on the 1st. part shall ye. Natl. Executive be appointed by Electors?

Mas. divd. Cont. ay. N. J. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes—6; noes—3; divided—1.]

On 2d. part shall the Electors be chosen by State Legislatures?

Mas. ay. Cont. ay. N. J. ay. Pa. ay. Del. ay. Md. ay. Va. no. N. C. ay. S. C. no. Geo. ay. [Ayes—8; noes—2.]

The part relating to the ratio in which the States sd. chuse electors was postponed nem. con.

Mr. L. MARTIN moved that the Executive be ineligible a 2d. time.

Mr. WILLIAMSON 2ds. the motion. He had no great confidence in the Electors to be chosen for the special purpose. They would not be the most respectable citizens; but persons not occupied in the high offices of Govt. They would be liable to undue influence, which might the more readily be practised as some of them will probably be in appointment 6 or 8 months before the object of it comes on.

Mr. ELSEWORTH supposed any persons might be appointed Electors, excepting solely, members of the Natl. Legislature.

On the question shall he be ineligible a 2d. time?

Mas. no. Ct. no. N. J. no. Pa. no. Del. no. Md. no. Va. no. N. C. ay. S. C. ay. Geo. no. [Ayes—2; noes—8.]

On the question Shall the Executive continue for 7 years? It passed in the negative Mas. divd. Cont. ay. N. J. no. Pa. no. Del. no. Md. no. Va. no. N. C. divd. S. C. ay. Geo. ay. [Ayes—3; noes—5; divided—2.] [In the printed Journal Cont. no. N. Jersey ay].

Mr. KING was afraid we shd. shorten the term too much.

Mr. Govr. MORRIS was for a short term, in order to avoid impeachts. which wd. be otherwise necessary.

Mr. BUTLER was agst. a frequency of the elections. Geo. & S. C. were too distant to send electors often.

Mr. ELSEWORTH was for 6 years. If the elections be too frequent, the Executive will not be firm eno'. There must be duties which will make him unpopular for the moment. There will be outs as well as ins. His administration therefore will be attacked and misrepresented.

Mr. WILLIAMSON was for 6 years. The expence will be considerable & ought not to be unnecessarily repeated. If the Elections are too frequent, the best men will not undertake the service and those of an inferior character will be liable to be corrupted.

On question for 6 years?

Mas. ay. Cont. ay. N. J. ay. Pa ay. Del. no. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes—9; noes—1.]

Adjourned

Resource 12

July 20, 1787 Constitutional Convention

Friday July 20, 1787
IN CONVENTION

The postponed Ratio of Electors for appointing the Executive; to wit 1 for each State whose inhabitants do not exceed 100,000, &c. being taken up.

Mr. MADISON observed that this would make in time all or nearly all the States equal. Since there were few that would not in time contain the number of inhabitants intitling them to 3 Electors: that this ratio ought either to be made temporary, or so varied as that it would adjust itself to the growing population of the States.

Mr. GERRY moved that in the *1st. instance* the Electors should be allotted to the States in the following ratio: to N. H. 1. Mas. 3. R. I. 1. Cont. 2. N. Y. 2. N. J. 2. Pa. 3. Del. 1. Md. 2. Va. 3. N. C. 2. S. C. 2. Geo. 1.

On the question to postpone in order to take up this motion of Mr. Gerry. It passed in the affirmative.

Mas. ay. Cont. no. N. J. no. Pa. ay. Del. no. Md. no. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes — 6; noes — 4.]

Mr. ELSEWORTH moved that 2 Electors be allotted to N. H. Some rule ought to be pursued; and N. H. has more than 100,000 inhabitants. He thought it would be proper also to allot 2. to Georgia

Mr. BROOM & Mr. MARTIN moved to postpone Mr. Gerry's allotment of Electors, leaving a fit ratio to be reported by the Committee to be appointed for detailing the Resolutions.

On this motion.

Mas. no. Ct. no. N. J. ay. Pa. no. Del. ay. Md. ay. Va. no. N. C. no. S. C. no. Geo. no. [Ayes — 3; noes — 7.]

Mr. HOUSTON 2ded. the motion of Mr. Elseworth to add another Elector to N. H. & Georgia. On the Question:

Mas. no. Ct. ay. N. J. no. Pa. no. Del. no. Md. no. Va. no. N. C. no. S. C. ay. Geo. ay. [Ayes — 3; noes — 7.]

Mr. WILLIAMSON moved as an amendment to Mr. Gerry's allotment of Electors in the 1st. instance that in future elections of the Natl. Executive, the number of Electors to be appointed by the several States shall be regulated by their respective numbers of Representatives in the 1st. branch pursuing as nearly as may be the present proportions.

On question on Mr. Gerry's ratio of Electors

Mas. ay. Ct. ay. N. J. no. Pa. ay. Del. no. Md. no. Va. ay. N. C. ay. S. C. ay. Geo. no. [Ayes — 6; noes — 4.]

….

Resource 13

July 21, 1787 Constitutional Convention

Saturday July 21, 1787
IN CONVENTION

Mr. WILLIAMSON moved that the Electors of the Executive should be paid out of the National Treasury for the Service to be performed by them. Justice required this: as it was a national service they were to render. The motion was agreed to nem.-con.
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Resource 14

July 23, 1787 Constitutional Convention

Monday July 23, 1787
IN CONVENTION

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Mr. HOUSTON & Mr. SPAIGHT moved "that the appointment of the Executive by Electors chosen by the Legislatures of the States, be reconsidered." Mr. Houston urged the extreme inconveniency & the considerable expense, of drawing together men from all the States for the single purpose of electing the Chief Magistrate.

On the question which was put without any debate.

N. H. ay. Mas. ay. Ct. ay. Pa. no. Del. ay. Md. no. Virga. no. N. C. ay. S. C. ay. Geo. ay. [Ayes — 7; noes — 3.]

Ordered that tomorrow be assigned for the reconsideration. Cont. & Pena. no — all the rest ay — .
….

Resource 15

July 24, 1787 Constitutional Convention

Tuesday July 24, 1787
IN CONVENTION

The appointment of the Executive by Electors reconsidered.

Mr. HOUSTON moved that he be appointed by the "Natl. Legislature," instead of "Electors appointed by the State Legislatures" according to the last decision of the mode. He dwelt chiefly on the improbability, that capable men would undertake the service of Electors from the more distant States.

Mr. SPAIGHT seconded the motion.

Mr. GERRY opposed it. He thought there was no ground to apprehend the danger urged by Mr. Houston. The election of the Executive Magistrate will be considered as of vast importance and will excite great earnestness. The best men, the Governours of the States will not hold it derogatory from their character to be the electors. If the motion should be agreed to, it will be necessary to make the Executive ineligible a 2d. time, in order to render him independent of the Legislature; which was an idea extremely repugnant to his way of thinking.

Mr. STRONG supposed that there would be no necessity, if the Executive should be appointed by the Legislature, to make him ineligible a 2d. time; as new elections of the Legislature will have intervened; and he will not depend for his 2d. appointment on the same sett of men as his first was recd. from. It had been suggested that gratitude for his past appointment wd. produce the same effect as dependence for his future appointment. He thought very differently. Besides this objection would lie agst. the Electors who would be objects of gratitude as well as the Legislature. It was of great importance not to make the Govt. too complex which would be the case if a new sett of men like the Electors should be introduced into it. He thought also that the first characters in the States would

not feel sufficient motives to undertake the office of Electors.

Mr. WILLIAMSON was for going back to the original ground; to elect the Executive for 7 years and render him ineligible a 2d. time. The proposed Electors would certainly not be men of the 1st. nor even of the 2d. grade in the States. These would all prefer a seat either in the Senate or the other branch of the Legislature. He did not like the Unity in the Executive. He had wished the Executive power to be lodged in three men taken from three districts into which the States should be divided. As the Executive is to have a kind of veto on the laws, and there is an essential difference of interests between the N. & S. States, particularly in the carrying trade, the power will be dangerous, if the Executive is to be taken from part of the Union, to the part from which he is not taken. The case is different here from what it is in England; where there is a sameness of interests throughout the Kingdom. Another objection agst. a single Magistrate is that he will be an elective King, and will feel the spirit of one. He will spare no pains to keep himself in for life, and will then lay a train for the succession of his children. It was pretty certain he thought that we should at some time or other have a King; but he wished no precaution to be omitted that might postpone the event as long as possible. -Ineligibility a 2d. time appeared to him to be the best precaution. With this precaution he had no objection to a longer term than 7 years. He would go as far as 10 or 12 years.

Mr. GERRY moved that the Legislatures of the States should vote by ballot for the Executive in the same proportions as it had been proposed they should chuse electors; and that in case a majority of the votes should not center on the same person, the 1st. branch of the Natl. Legislature should chuse two out of the 4 candidates having most votes, and out of these two, the 2d. branch should chuse the Executive.

Mr. KING seconded the motion—and on the Question to postpone in order to take it into consideration. The *noes* were so predominant, that the States were not counted.

Question on Mr. Houston's motion that the Executive be appd. by Nal. Legislature

N. H. ay. Mas. ay. Ct. no. N. J. ay. Pa. no. Del. ay. Md. no. Va. no. N. C. ay. S. C. ay. Geo. ay. [Ayes—7; noes—4.]

Mr. L. MARTIN & Mr. GERRY moved to re-instate the

ineligibility of the Executive a 2d. time.

Mr. ELSEWORTH. With many this appears a natural consequence of his being elected by the Legislature. It was not the case with him. The Executive he thought should be reelected if his conduct proved him worthy of it. And he will be more likely to render himself, worthy of it if he be rewardable with it. The most eminent characters also will be more willing to accept the trust under this condition, than if they foresee a necessary degradation at a fixt period.

Mr. GERRY. That the Executive shd. be independent of the Legislature is a clear point. The longer the duration of his appointment the more will his dependence be diminished. It will be better then for him to continue 10, 15, or even 20 years and be ineligible afterwards.

Mr. KING was for making him re-eligible. This is too great an advantage to be given up for the small effect it will have on his dependence, if impeachments are to lie. He considered these as rendering the tenure during pleasure.

Mr. L. MARTIN, suspending his motion as to the ineligibility, moved that the appointmt. of the Executive shall continue for Eleven years.

Mr. GERRY suggested fifteen years

Mr. KING twenty years. This is the medium life of princes.

Mr. DAVIE Eight years

Mr. WILSON. The difficulties & perplexities into which the House is thrown proceed from the election by the Legislature which he was sorry had been reinstated. The inconveniency of this mode was such that he would agree to almost any length of time in order to get rid of the dependence which must result from it. He was persuaded that the longest term would not be equivalent to a proper mode of election; unless indeed it should be during good behaviour. It seemed to be supposed that at a certain advance in life, a continuance in office would cease to be agreeable to the officer, as well as desirable to the public. Experience had shewn in a variety of instances that both a capacity & inclination for public service existed—in very advanced stages. He mentioned the instance of a Doge of Venice who was elected after he was 80 years of age. The popes have generally been elected at very advanced periods, and yet in no case had a more steady or a better concerted

policy been pursued than in the Court of Rome. If the Executive should come into office at 35. years of age, which he presumes may happen & his continuance should be fixt at 15 years. at the age of 50. in the very prime of life, and with all the aid of experience, he must be cast aside like a useless hulk. What an irreparable loss would the British Jurisprudence have sustained, had the age of 50. been fixt there as the ultimate limit of capacity or readiness to serve the public. The great luminary (Ld. Mansfield) held his seat for thirty years after his arrival at that age. Notwithstanding what had been done he could not but hope that a better mode of election would yet be adopted; and one that would be more agreeable to the general sense of the House. That time might be given for further deliberation he wd. move that the present question be postponed till tomorrow.

Mr. BROOM seconded the motion to postpone.

Mr. GERRY. We seem to be entirely at a loss on this head. He would suggest whether it would not be adviseable to refer the clause relating to the Executive to the Committee of detail to be appointed. Perhaps they will be able to hit on something that may unite the various opinions which have been thrown out.

Mr. WILSON. As the great difficulty seems to spring from the mode of election, he wd. suggest a mode which had not been mentioned. It was that the Executive be elected for 6 years by a small number, not more than 15 of the Natl. Legislature, to be drawn from it, not by ballot, but by lot and who should retire immediately and make the election without separating. By this mode intrigue would be avoided in the first instance, and the dependence would be diminished. This was not he said a digested idea and might be liable to strong objections.

Mr. Govr. MORRIS. Of all possible modes of appointment that by the Legislature is the worst. If the Legislature is to appoint, and to impeach or to influence the impeachment, the Executive will be the mere creature of it. He had been opposed to the impeachment but was now convinced that impeachments must be provided for, if the appt. was to be of any duration. No man wd. say, that an Executive known to be in the pay of an Enemy, should not be removeable in some way or other. He had been charged heretofore (by Col. Mason) with inconsistency in pleading for confidence in the Legislature on some occasions, & urging a distrust on others.

The charge was not well founded. The Legislature is worthy of unbounded confidence in some respects, and liable to equal distrust in others. When their interest coincides precisely with that of their Constituents, as happens in many of their Acts, no abuse of trust is to be apprehended. When a strong personal interest happens to be opposed to the general interest, the Legislature can not be too much distrusted. In all public bodies there are two parties. The Executive will necessarily be more connected with one than with the other. There will be a personal interest therefore in one of the parties to oppose as well as in the other to support him. Much had been said of the intrigues that will be practised by the Executive to get into office. Nothing had been said on the other side of the intrigues to get him out of office. Some leader of party will always covet his seat, will perplex his administration, will cabal with the Legislature, till he succeeds in supplanting him. This was the way in which the King of England was got out, he meant the real King, the Minister. This was the way in which Pitt (Ld. Chatham) forced himself into place. Fox was for pushing the matter still farther. If he carried his India bill, which he was very near doing, he would have made the Minister, the King in form almost as well as in substance. Our President will be the British Minister, yet we are about to make him appointable by the Legislature. Something had been said of the danger of Monarchy. If a good government should not now be formed, if a good organization of the Execuve should not be provided, he doubted whether we should not have something worse than a limited Monarchy. In order to get rid of the dependence of the Executive on the Legislature, the expedient of making him ineligible a 2d. time had been devised. This was as much as to say we shd. give him the benefit of experience, and then deprive ourselves of the use of it. But make him ineligible a 2d. time—and prolong his duration even to 15-years, will he by any wonderful interposition of providence at that period cease to be a man? No he will be unwilling to quit his exaltation, the road to his object thro' the Constitution will be shut; he will be in possession of the sword, a civil war will ensue, and the Commander of the victorious army on which ever side, will be the despot of America. This consideration renders him particularly anxious that the Executive should be properly constituted. The vice here would not, as in some other parts of the system be curable. It is the most difficult of all rightly

to balance the Executive. Make him too weak: The Legislature will usurp his powers: Make him too strong. He will usurp on the Legislature. He preferred a short period, a re-eligibility, but a different mode of election. A long period would prevent an adoption of the plan: it ought to do so. He shd. himself be afraid to trust it. He was not prepared to decide on Mr. Wilson's mode of election just hinted by him. He thought it deserved consideration. It would be better that chance sd. decide than intrigue.

On a question to postpone the consideration of the Resolution on the subject of the Executive

N. H. no. Mas. no. Ct. ay. N. J. no. Pa. ay. Del. divd. Md. ay. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes—4; noes—6; divided—1.]

Mr. WILSON then moved that the Executive be chosen every ------- years by ------- Electors to be taken by lot from the Natl Legislature who shall proceed immediately to the choice of the Executive and not separate until it be made.

Mr. CARROL 2ds. the motion

Mr. GERRY. this is committing too much to chance. If the lot should fall on a sett of unworthy men, an unworthy Executive must be saddled on the Country. He thought it had been demonstrated that no possible mode of electing by the Legislature could be a good one.

Mr. KING. The lot might fall on a majority from the same State which wd. ensure the election of a man from that State. We ought to be governed by reason, not by chance. As nobody seemed to be satisfied, he wished the matter to be postponed

Mr. WILSON did not move this as the best mode. His opinion remained unshaken that we ought to resort to the people for the election. He seconded the postponement.

Mr. Govr. MORRIS observed that the chances were almost infinite agst. a majority of electors from the same State.

On a question whether the last motion was in order, it was determined in the affirmative; 7. ays. 4 noes.

On the question of postponent. it was agreed to nem. con.

Mr. CARROL took occasion to observe that he considered the clause declaring that direct taxation on the States should be in proportion to representation, previous to the obtaining an actual census, as very objectionable, and that he reserved to himself the right of opposing it, if the Report of the Committee of detail

should leave it in the plan.

Mr. Govr. MORRIS hoped the Committee would strike out the whole of the clause proportioning direct taxation to representation. He had only meant it as a bridge to assist us over a certain gulph; having passed the gulph the bridge may be removed. He thought the principle laid down with so much strictness, liable to strong objections

On a ballot for a Committee to report a Constitution conformable to the Resolutions passed by the Convention, the members chosen were

Mr. Rutlidge, Mr. Randolph, Mr. Ghorum, Mr. Elseworth, Mr. Wilson—

On motion to discharge the Come. of the whole from the propositions submitted to the Convention by Mr. C. Pinkney as the basis of a constitution, and to refer them to the Committee of detail just appointed, it was agd. to nem. con.

A like motion was then made & agreed to nem: con: with respect to the propositions of Mr. Patterson

Adjourned.

Resource 16

July 25, 1787 Constitutional Convention

Tuesday July 25, 1787
IN CONVENTION

Clause relating to the Executive again under consideration.

Mr. ELSEWORTH moved "that the Executive be appointed by the Legislature," ["]except when the magistrate last chosen shall have continued in office the whole term for which he was chosen, & be reeligible, in which case the choice shall be by Electors appointed by the Legislatures of the States for that purpose." By this means a deserving magistrate may be reelected without making him dependent on the Legislature.

Mr. GERRY repeated his remark that an election at all by the Natl. Legislature was radically and incurably wrong; and moved that the Executive be appointed by the Governours & Presidents of the States, with advice of their Councils, and where there are no Councils by Electors chosen by the Legislatures. The executives to vote in the following proportions: viz-

Mr. MADISON. There are objections agst. every mode that has been, or perhaps can be proposed. The election must be made either by some existing authority under the Natil. or State Constitutions—or by some special authority derived from the people—or by the people themselves. -The two Existing authorities under the Natl. Constitution wd. be the Legislative & Judiciary. The latter he presumed was out of the question. The former was in his Judgment liable to insuperable objections. Besides the general influence of that mode on the independence of the Executive, 1. the election of the Chief Magistrate would agitate & divide the legislature so much that the public interest would materially suffer by it. Public bodies are always apt to be thrown into contentions, but into more violent ones by such occasions than by any others. 2. the candidate would intrigue with the Legislature, would derive his appointment

from the predominant faction, and be apt to render his administration subservient to its views. 3. The Ministers of foreign powers would have and make use of, the opportunity to mix their intrigues & influence with the Election. Limited as the powers of the Executive are, it will be an object of great moment with the great rival powers of Europe who have American possessions, to have at the head of our Governmt. a man attached to their respective politics & interests. No pains, nor perhaps expense, will be spared, to gain from the Legislature an appointmt. favorable to their wishes. Germany & Poland are witnesses of this danger. In the former, the election of the Head of the Empire, till it became in a manner hereditary, interested all Europe, and was much influenced by foreign interference. In the latter, altho' the elective Magistrate has very little real power, his election has at all times produced the most eager interference of forign princes, and has in fact at length slid entirely into foreign hands. The existing authorities in the States are the Legislative, Executive & Judiciary. The appointment of the Natl. Executive by the first, was objectionable in many points of view, some of which had been already mentioned. He would mention one which of itself would decide his opinion. The Legislatures of the States had betrayed a strong propensity to a variety of pernicious measures. One object of the Natl. Legislre. was to controul this propensity. One object of the Natl. Executive, so far as it would have a negative on the laws, was to controul the Natl. Legislature, so far as it might be infected with a similar propensity. Refer the appointmt. of the Natl. Executive to the State Legislatures, and this controuling purpose may be defeated. The Legislatures can & will act with some kind of regular plan, and will promote the appointmt. of a man who will not oppose himself to a favorite object. Should a majority of the Legislatures at the time of election have the same object, or different objects of the same kind, the Natl. Executive would be rendered subservient to them. —An appointment by the State Executives, was liable among other objections to this insuperable one, that being standing bodies, they could & would be courted, and intrigued with by the Candidates, by their partizans, and by the Ministers of foreign powers. The State Judiciarys had not & he presumed wd. not be proposed as a proper source of appointment. The option before us then lay between an appointment by Electors chosen by the people—and an immediate appointment

by the people. He thought the former mode free from many of the objections which had been urged agst. it, and greatly preferable to an appointment by the Natl. Legislature. As the electors would be chosen for the occasion, would meet at once, & proceed immediately to an appointment, there would be very little opportunity for cabal, or corruption. As a farther precaution, it might be required that they should meet at some place, distinct from the seat of Govt. and even that no person within a certain distance of the place at the time shd. be eligible. This Mode however had been rejected so recently & by so great a majority that it probably would not be proposed anew. The remaining mode was an election by the people or rather by the qualified part of them, at large: With all its imperfections he liked this best. He would not repeat either the general argumts. for or the objections agst. this mode. He would only take notice of two difficulties which he admitted to have weight. The first arose from the disposition in the people to prefer a Citizen of their own State, and the disadvantage this wd. throw on the smaller States. Great as this objection might be he did not think it equal to such as lay agst. every other mode which had been proposed. He thought too that some expedient might be hit upon that would obviate it. The second difficulty arose from the disproportion of qualified voters in the N. & S. States, and the disadvantages which this mode would throw on the latter. The answer to this objection was 1. that this disproportion would be continually decreasing under the influence of the Republican laws introduced in the S. States, and the more rapid increase of their population. 2. That local considerations must give way to the general interest. As an individual from the S. States he was willing to make the sacrifice.

Mr. ELSEWORTH. The objection drawn from the different sizes of the States, is unanswerable. The Citizens of the largest States would invariably prefer the Candidate within the State; and the largest States wd. invariably have the man.

Question on Mr. Elseworth's motion as above.

N. H. ay. Mas. no. Ct ay. N. J. no. Pa. ay. Del. no. Md. ay. Va. no. N. C. no. S. C. no. Geo. no. [Ayes—4; noes—7.]

Mr. PINKNEY moved that the election by the Legislature be qualified with a proviso that no person be eligible for more than 6 years in any twelve years. He thought this would have all the advantage & at the same time avoid in some degree the inconveni-

ency, of an absolute ineligibility a 2d. time.

Col. MASON approved the idea. It had the sanction of experience in the instance of Congs. and some of the Executives of the States. It rendered the Executive as effectually independent, as an ineligibility after his first election, and opened the way at the same time for the advantage of his future services. He preferred on the whole the election by the Natl. Legislature: Tho' Candor obliged him to admit, that there was great danger of foreign influence, as had been suggested. This was the most serious objection with him that had been urged.

Mr. BUTLER. The two great evils to be avoided are cabal at home, & influence from abroad. It will be difficult to avoid either if the Election be made by the Natl. Legislature. On the other hand: The Govt. should not be made so complex & unwieldy as to disgust the States. This would be the case, if the election shd. be referred to the people. He liked best an election by Electors chosen by the Legislatures of the States. He was agst. re-eligibility at all events. He was also agst. a ratio of votes in the States. An equality should prevail in this case. The reasons for departing from it do not hold in the case of the Executive as in that of the Legislature.

Mr. GERRY approved of Mr. Pinkney's motion as lessening the evil.

Mr. Govr. MORRIS was agst. a rotation in every case. It formed a political School, in wch we were always governed by the scholars, and not by the Masters. The evils to be guarded agst. in this case are 1. the undue influence of the Legislature. 2. instability of Councils. 3. misconduct in office. To guard agst. the first, we run into the second evil. We adopt a rotation which produces instability of Councils. To avoid Sylla we fall into Charibdis. A change of men is ever followed by a change of measures. We see this fully exemplified in the vicissitudes among ourselves, particularly in the State of Pena. The self-sufficiency of a victorious party scorns to tread in the paths of their predecessors. Rehoboam will not imitate Soloman. 2. the Rotation in office will not prevent intrigue and dependence on the Legislature. The man in office will look forward to the period at which he will become re-eligible. The distance of the period, the improbability of such a protraction of his life will be no obstacle. Such is the nature of man, formed by his benevolent author no doubt for wise ends, that altho' he knows his existence

to be limited to a span, he takes his measures as if he were to live forever. But taking another supposition, the inefficacy of the expedient will be manifest. If the magistrate does not look forward to his re-election to the Executive, he will be pretty sure to keep in view the opportunity of his going into the Legislature itself. He will have little objection then to an extension of power on a theatre where he expects to act a distinguished part; and will be very unwilling to take any step that may endanger his popularity with the Legislature, on his influence over which the figure he is to make will depend. 3. To avoid the third evil, impeachments will be essential, and hence an additional reason agst. an election by the Legislature. He considered an election by the people as the best, by the Legislature as the worst, mode. Putting both these aside, he could not but favor the idea of Mr. Wilson, of introducing a mixture of lot. It will diminish, if not destroy both cabal & dependence.

Mr. WILLIAMSON was sensible that strong objections lay agst. an election of the Executive by the Legislature, and that it opened a door for foreign influence. The principal objection agst. an election by the people seemed to be, the disadvantage under which it would place the smaller States. He suggested as a cure for this difficulty, that each man should vote for 3 candidates. One of these he observed would be probably of his own State, the other 2. of some other States; and as probably of a small as a large one.

Mr. Govr. MORRIS liked the idea, suggesting as an amendment that each man should vote for two persons one of whom at least should not be of his own State.

Mr. MADISON also thought something valuable might be made of the suggestion with the proposed amendment of it. The second best man in this case would probably be the first, in fact. The only objection which occurred was that each Citizen after havg. given his vote for his favorite fellow Citizen, wd. throw away his second on some obscure Citizen of another State, in order to ensure the object of his first choice. But it could hardly be supposed that the Citizens of many States would be so sanguine of having their favorite elected, as not to give their second vote with sincerity to the next object of their choice. It might moreover be provided in favor of the smaller States that the Executive should not be eligible more than times in years from the same State.

Mr. GERRY. A popular election in this case is radically vi-

cious. The ignorance of the people would put it in the power of some one set of men dispersed through the Union & acting in Concert to delude them into any appointment. He observed that such a Society of men existed in the Order of the Cincinnati. They are respectable, United, and influencial. They will in fact elect the chief Magistrate in every instance, if the election be referred to the people. His respect for the characters composing this Society could not blind him to the danger & impropriety of throwing such a power into their hands.

Mr. DICKENSON. As far as he could judge from the discussions which had taken place during his attendance, insuperable objections lay agst. an election of the Executive by the Natl. Legislature; as also by the Legislatures or Executives of the States. He had long leaned towards an election by the people which he regarded as the best & purest source. Objections he was aware lay agst. this mode, but not so great he thought as agst. the other modes. The greatest difficulty in the opinion of the House seemed to arise from the partiality of the States to their respective Citizens. But, might not this very partiality be turned to a useful purpose. Let the people of each State chuse its best Citizen. The people will know the most eminent characters of their own States, and the people of different States will feel an emulation in selecting those of which they will have the greatest reason to be proud. Out of the thirteen names thus selected, an Executive Magistrate may be chosen either by the Natl. Legislature, or by Electors appointed by it.

On a Question which was moved for postponing Mr. Pinkney's motion; in order to make way for some such proposition as had been hinted by Mr. Williamson & others: it passed in the negative.

N. H. no. Mas. no. Ct. ay. N. J. ay. Pa. ay. Del. no. Md. ay. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes—5; noes—6.]

On Mr. Pinkney's motion that no person shall serve in the Executive more than 6 years in 12. years, it passed in the negative.

N. H. ay. Mas. ay. Ct. no. N. J. no. Pa. no. Del. no. Md. no. Va. no. N. C. ay. S. C. ay. Geo. ay. [Ayes—5; noes—6.]

On a motion that the members of the Committee be furnished with copies of the proceedings it was so determined; S. Carolina alone being in the negative.

It was then moved that the members of the House might take

copies of the Resolions which had been agreed to; which passed in the negative. N. H. no. Mas. no. Con: ay. N. J. ay. Pa. no. Del. ay. Maryd. no. Va. ay. N. C. ay. S. C. no. Geo. no. [Ayes—5; noes—6.]

Mr. GERRY & Mr. BUTLER moved to refer the resolution relating to the Executive (except the clause making it consist of a single person) to the Committee of detail

Mr. WILSON hoped that so important a branch of the System wd. not be committed untill a general principle shd. be fixed by a vote of the House.

Mr. LANGDON was for the Commitment—Adjd.

Resource 17

July 26, 1787 Constitutional Convention

Tuesday July 26, 1787
IN CONVENTION

Col. MASON. In every Stage of the Question relative to the Executive, the difficulty of the subject and the diversity of the opinions concerning it have appeared. Nor have any of the modes of constituting that department been satisfactory. 1. It has been proposed that the election should be made by the people at large; that is that an act which ought to be performed by those who know most of Eminent characters, & qualifications, should be performed by those who know least. 2. that the election should be made by the Legislatures of the States. 3. by the Executives of the States. Agst. these modes also strong objections have been urged. 4. It has been proposed that the election should be made by Electors chosen by the people for that purpose. This was at first agreed to: But on further consideration has been rejected. 5. Since which, the mode of Mr. Williamson, requiring each freeholder to vote for several candidates has been proposed. This seemed like many other propositions, to carry a plausible face, but on closer inspection is liable to fatal objections. A popular election in any form, as Mr. Gerry has observed, would throw the appointment into the hands of the Cincinnati, a Society for the members of which he had a great respect; but which he never wished to have a preponderating influence in the Govt. 6. Another expedient was proposed by Mr. Dickenson, which is liable to so palpable & material an inconvenience that he had little doubt of its being by this time rejected by himself. It would exclude every man who happened not to be popular within his own State; tho' the causes of his local unpopularity might be of such a nature as to recommend him to the States at large. 7. Among other expedients, a lottery has been introduced.

But as the tickets do not appear to be in much demand, it will probably, not be carried on, and nothing therefore need be said on that subject. After reviewing all these various modes, he was led to conclude, that an election by the Natl. Legislature as originally proposed, was the best. If it was liable to objections, it was liable to fewer than any other. He conceived at the same time that a second election ought to be absolutely prohibited. Having for his primary object, for the pole-star of his political conduct, the preservation of the rights of the people, he held it as an essential point, as the very palladium of Civil liberty, that the great officers of State, and particularly the Executive should at fixed periods return to that mass from which they were at first taken, in order that they may feel & respect those rights & interests, which are again to be personally valuable to them. He concluded with moving that the constitution of the Executive as reported by the Come. of the whole be re-instated, viz. "that the Executive be appointed for seven years, & be ineligible a 2d. time"

Mr. DAVIE seconded the motion

Docr. FRANKLIN. It seems to have been imagined by some that the returning to the mass of the people was degrading the magistrate. This he thought was contrary to republican principles. In free Governments the rulers are the servants, and the people their superiors & sovereigns. For the former therefore to return among the latter was not to degrade but to promote them. And it would be imposing an unreasonable burden on them, to keep them always in a State of servitude, and not allow them to become again one of the Masters.

Question on Col. Masons motion as above; which passed in the affirmative

N. H. ay. Masts. not on floor. Ct. no. N. J. ay. Pa. no. Del. no. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes—7; noes—3; absent—1.]

Mr. Govr. MORRIS was now agst. the whole paragraph. In answer to Col. Mason's position that a periodical return of the great officers of the State into the mass of the people, was the palladium of Civil liberty he wd. observe that on the same principle the Judiciary ought to be periodically degraded; certain it was that

the Legislature ought on every principle, yet no one had proposed, or conceived that the members of it should not be re-eligible. In answer to Docr. Franklin, that a return into the mass of the people would be a promotion, instead of a degradation, he had no doubt that our Executive like most others would have too much patriotism to shrink from the burden of his office, and too much modesty not to be willing to decline the promotion.

On the question on the whole resolution as amended in the words following—"that a National Executive be instituted—to consist of a single person—to be chosen by the Natl. legislature—for the term of seven years—to be ineligible a 2d. time—with power to carry into execution the natl. laws—to appoint to offices in cases not otherwise provided for—to be removable on impeachment & conviction of malpractice or neglect of duty—to receive a fixt compensation for the devotion of his time to the public service, to be paid out of the Natl. treasury"—it passed in the affirmative

N. H. ay. Mas. not on floor. Ct. ay. N. J. ay. Pa. no. Del. no. Md. no. Va. divd. Mr. Blair & Col. Mason ay. Genl. Washington & Mr. Madison no. (Mr. Randolph happened to be out of the House.) N. C. ay. S. C. ay. Geo. ay. [Ayes—6; noes—3; divided—1; absent—1.]

....

Resource 18

August 6, 1787 Constitutional Convention

Monday August 6, 1787
IN CONVENTION

Mr. John Francis Mercer from Maryland took his seat.

Mr. RUTLIDGE delivered in the Report of the Committee of detail as follows: a printed copy being at the same time furnished to each member:

"We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.["]

ARTICLE I
The stile of the (this) Government shall be, "The United States of America"

II
The Government shall consist of supreme legislative, executive, and judicial powers.
….
X
Sect. 1. The Executive Power of the United States shall be vested in a single person. His stile shall be, "The President of the United States of America;" and his title shall be, "His Excellency." He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time.

Sect. 2. He shall, from time to time, give information to the Legislature, of the state of the Union: he may recommend to their consideration such measures as he shall judge necessary, and expedient: he may convene them on extraordinary occasions. In case of disagreement between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he thinks proper: he shall take care that the laws of the United States be duly and faithfully executed: he shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution. He shall receive Ambassadors, and may correspond with the supreme Executives of the several States. He shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment. He shall be commander in chief of the Army and Navy of the United States, and of the Militia of the several States. He shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during his continuance in office. Before he shall enter on the duties of his department, he shall take the following oath or affirmation, "I — solemnly swear, (or affirm) that that I will faithfully execute the office of President of the United States of America." He shall be removed from his office on impeachment by the House of Representatives, and conviction in the supreme Court, of treason, bribery, or corruption. In case of his removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed.

….

XIX

On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.

….

XXI

The ratifications of the Conventions of ----- States shall be sufficient for organizing this Constitution.

XXII
This Constitution shall be laid before the United States in Congress assembled, for their approbation; and it is the opinion of this Convention, that it should be afterwards submitted to a Convention chosen, under the recommendation of its legislature, in order to receive the ratification of such Convention.

XXIII
To introduce this government, it is the opinion of this Convention, that each assenting Convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the Conventions of ----- States, should appoint and publish a day, as early as may be, and appoint a place for commencing proceedings under this Constitution; that after such publication, the Legislatures of the several States should elect members of the Senate, and direct the election of members of the House of Representatives; and that the members of the Legislature should meet at the time and place assigned by Congress, and should, as soon as may be, after their meeting, choose the President of the United States, and proceed to execute this Constitution.

A motion was made to adjourn till Wednesday, in order to give leisure to examine the Report; which passed in the negative—N. H. no. Mas. no. Ct. no. Pa. ay. Md. ay. Virg. ay. N. C. no. S. C. no.

The House then adjourned till tomorrow 11 OC.

Resource 19

August 24, 1787 Constitutional Convention

Friday August 24, 1787
IN CONVENTION

….
Art. X. sect. 1. "The executive power of the U. S. shall be vested in a single person. His stile shall be "The President of the U. S. of America" and his title shall be "His Excellency." He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time.["]

On the question for vesting the power in a *single person*. It was agreed to nem: con: So also on the *Stile* and *title*.

Mr. RUTLIDGE moved to insert "joint" before the word "ballot," as the most convenient mode of electing.

Mr. SHERMAN objected to it as depriving the States represented in the Senate of the negative intended them in that house.

Mr. GHORUM said it was wrong to be considering at every turn whom the Senate would represent. The public good was the true object to be kept in view. Great delay and confusion would ensue if the two Houses shd. vote separately, each having a negative on the choice of the other.

Mr. DAYTON. It might be well for those not to consider how the Senate was constituted, whose interest it was to keep it out of sight. – If the amendment should be agreed to, a *joint* ballot would in fact give the appointment to one House. He could never agree to the clause with such an amendment. There could be no doubt of the two Houses separately concurring in the same person for President. The importance & necessity of the case would ensure a concurrence.

Mr. CARROL moved to strike out "by the Legislature" and insert "by the people."

Mr. WILSON 2ded. him & on the question

N. H. no. Massts. no. Cont. no. N. J. no. Pa. ay. Del. ay. Md. no. Va. no N. C. no. S. C. no. Geo. no. [Ayes — 2; noes — 9.]

Mr. BREARLY was opposed to the motion for inserting the word "joint." The argument that the small States should not put their hands into the pockets of the large ones did not apply in this case.

Mr. WILSON urged the reasonableness of giving the larger States a larger share of the appointment, and the danger of delay from a disagreement of the two Houses. He remarked also that the Senate had peculiar powers balancing the advantage given by a joint balot in this case to the other branch of the Legislature.

Mr. LANGDON. This general officer ought to be elected by the joint & general voice. In N. Hampshire the mode of separate votes by the two Houses was productive of great difficulties. The negative of the Senate would hurt the feelings of the man elected by the votes of the other branch. He was for inserting "joint" tho' unfavorable to N. Hampshire as a small State.

Mr. WILSON remarked that as the President of the Senate was to be President of the U. S. that Body in cases of vacancy might have an interest in throwing dilatory obstacles in the way, if its separate concurrence should be required.

Mr. MADISON. If the amendment be agreed to the rule of voting will give to the largest State, compared with the smallest, an influence as 4 to 1 only, altho the population is as 10 to 1. This surely can not be unreasonable as the President is to act for the people not for the States. The President of the Senate also is to be occasionally President of the U. S. and by his negative alone can make 3/4 of the other branch necessary to the passage of a law. This is another advantage enjoyed by the Senate.

On the question for inserting "joint," it passed in the affirmative

N. H. ay. Masts. ay. Ct. no. N. J. no. Pa. ay. Del. ay. Md. no Va. ay. N. C. ay. S. C. ay. Geo. no. [Ayes — 7; noes — 4.]

Mr. DAYTON then moved to insert, after the word "Legislatures" the words "each State having one vote"

Mr. BREARLEY 2ded. him, and on the question it passed in the negative

N. H. no. Mas. no. Ct. ay. N. J. ay. Pa. no. Del. ay. Md. ay. Va. no. N. C. no. S. C. no. Geo. ay. [Ayes — 5; noes — 6.]

Mr. PINKNEY moved to insert after the word "Legislature" the words "to which election a majority of the votes of the members present shall be required" &

On this question, it passed in the affirmative

N. H. ay. Mas. ay. Ct. ay. N. J. no. Pa. ay. Del. ay. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes — 10; noes — 1.]

Mr. READ moved "that in case the numbers for the two highest in votes should be equal, then the President of the Senate shall have an additional casting vote," which was disagreed to by a general negative.

Mr. Govr. MORRIS opposed the election of the President by the Legislature. He dwelt on the danger of rendering the Executive uninterested in maintaining the rights of his Station, as leading to Legislative tyranny. If the Legislature have the Executive dependent on them, they can perpetuate & support their usurpations by the influence of tax-gatherers & other officers, by fleets armies &c. Cabal & corruption are attached to that mode of election: so also is ineligibility a second time. Hence the Executive is interested in Courting popularity in the Legislature by sacrificing his Executive Rights; & then he can go into that Body, after the expiration of his Executive office, and enjoy there the fruits of his policy. To these considerations he added that rivals would be continually intriguing to oust the President from his place. To guard against all these evils he moved that the President "shall be chosen by Electors to be chosen by the People of the several States"

Mr. CARROL 2ded. him & on the question it passed in the negative.

N. H. no. Mas. no. Ct. ay. N. J. ay. Pa. ay. Del. ay. Md. no. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes — 5; noes — 6.]

Mr. DAYTON moved to postpone the consideration of the two last clauses of Sect. 1. art. X. which was disagreed to without a count of the States.

Mr. BROOME moved to refer the two clauses to a Committee of a member from each State, & on the question, it failed the States being equally divided.

N. H. no. Mas. no. Ct. divd. N. J. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes — 5; noes — 5; divided — 1.]

On the question taken on the first part of Mr. Govr. Morris's Motion to wit "shall be chosen by electors" as an abstract question, it failed the States being equally divided.

N. H. no. Mas. abst. Ct. divd. N. Jersey ay. Pa. ay. Del. ay. Md. divd. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes — 4; noes — 4; divided — 2; absent — 1.]

The consideration of the remaining clauses of Sect 1. art X. was then postponed till tomorrow at the instance of the Deputies of New Jersey.

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Resource 20

August 31, 1787 Constitutional Convention

Friday August 31, 1787
IN CONVENTION

….
Art: XXIII being taken up, as far as the words "assigned by Congress" inclusive, was agreed to nem: con: the blank having been first filled with the word "nine" as of course.

On a motion for postponement the residue of the clause, concerning the choice of the President &c.

N. H. no. Mas. ay. Ct. no. N. J. no. Pa. no. Del. ay. Md. no. Va. ay. N. C. ay. S. C. no. Geo. no. [Ayes — 4; noes — 7.]

Mr. Govr. MORRIS then moved to strike out the words "choose the President of the U. S. and" — this point, of choosing the President not being yet finally determined, & on this question

N. H. no. Mas. ay. Ct. ay. N. J. ay. Pa. ay Del. ay. Md. divd. Va. ay. N. C. ay. S. C. ay. [In the printed Journal- S. C. — no.] Geo. ay. [Ayes — 9; noes — 1; divided — 1.]

Art: XXIII as amended was then agreed to nem: con:

….
On motion of Mr. SHERMAN it was agreed to refer such parts of the Constitution as have been postponed, and such parts of Reports as have not been acted on, to a Committee of a member from each State; the Committee appointed by ballot, being— Mr. Gilman, Mr. King, Mr. Sherman, Mr. Brearly, Mr. Govr. Morris, Mr. Dickinson, Mr. Carrol, Mr. Madison, Mr. Williamson, Mr. Butler & Mr. Baldwin.

(The House adjourned)

Resource 21

September 4, 1787 Constitutional Convention

Tuesday September 4, 1787
IN CONVENTION

Mr. BREARLY from the Committee of eleven made a further partial Report as follows

"The Committee of Eleven to whom sundry resolutions &c were referred on the 31st. of August, report that in their opinion the following additions and alterations should be made to the Report before the Convention, viz

(1.) The first clause of sect: 1. art. 7. to read as follow-'The Legislature shall have power to lay and collect taxes duties imposts & excises, to pay the debts and provide for the common defence & general welfare, of the U. S.'

(2). At the end of the 2d. clause of sect. 1. art. 7. add 'and with the Indian Tribes.'

(3) In the place of the 9th. art. Sect. 1. to be inserted 'The Senate of the U. S. shall have power to try all impeachments; but no person shall be convicted without the concurrence of two thirds of the members present.'

(4) After the word 'Excellency' in sect. 1. art. 10. to be inserted. 'He shall hold his office during the term of four years, and together with the vice-President, chosen for the same term, be elected in the following manner, viz. Each State shall appoint in such manner as its Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives to which the State may be entitled in the Legislature. The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves; and they shall make a list of all the persons voted for, and of the number of votes for

each, which list they shall sign and certify and transmit sealed to the Seat of the Genl. Government, directed to the President of the Senate—The President of the Senate shall in that House open all the certificates; and the votes shall be then & there counted. The Person having the greatest number of votes shall be the President, if such number be a majority of that of the electors; and if there be more than one who have such majority, and have an equal number of votes, then the Senate shall immediately choose by ballot one of them for President: but if no person have a majority, then from the five highest on the list, the Senate shall choose by ballot the President. And in every case after the choice of the President, the person having the greatest number of votes shall be vice-president: but if there should remain two or more who have equal votes, the Senate shall choose from them the vice-President. The Legislature may determine the time of choosing and assembling the Electors, and the manner of certifying and transmitting their votes.'

(5) 'Sect. 2. No person except a natural born citizen or a Citizen of the U. S. at the time of the adoption of this Constitution shall be eligible to the office of President; nor shall any person be elected to that office, who shall be under the age of thirty five years, and who has not been in the whole, at least fourteen years a resident within the U. S.'

(6) 'Sect. 3. The vice-president shall be ex officio President of the Senate, except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside, and excepting also when he shall exercise the powers and duties of President, in which case & in case of his absence, the Senate shall chuse a President pro tempore.—The vice President when acting as President of the Senate shall not have a vote unless the House be equally divided.'

(7) 'Sect. 4. The President by and with the advice and Consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U. S., whose appointments are not otherwise herein provided for. But no Treaty

shall be made without the consent of two thirds of the members present.'

(8) After the words—"into the service of the U. S." in sect. 2. art: 10. add 'and may require the opinion in writing of the principal officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices.'

The latter part of Sect. 2. Art: 10. to read as follows.

(9) 'He shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for Treason, or bribery, and in case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office, the vice-president shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.'["]

The (1st.) clause of the Report was agreed to, nem. con.

The (2) clause was also agreed to nem: con:

The (3) clause was postponed in order to decide previously on the mode of electing the President.

The (4) clause was accordingly taken up.

Mr. GORHAM disapproved of making the next highest after the President, the vice-President, without referring the decision to the Senate in case the next highest should have less than a majority of votes. as the regulation stands a very obscure man with very few votes may arrive at that appointment

Mr. SHERMAN said the object of this clause of the report of the Committee was to get rid of the ineligibility, which was attached to the mode of election by the Legislature, & to render the Executive independent of the Legislature. As the choice of the President was to be made out of the five highest, obscure characters were sufficiently guarded against in that case; and he had no objection to requiring the vice-President to be chosen in like manner, where the choice was not decided by a majority in the first instance

Mr. MADISON was apprehensive that by requiring both the President & vice President to be chosen out of the five highest candidates, the attention of the electors would be turned too much to making candidates instead of giving their votes in order to a

definitive choice. Should this turn be given to the business, the election would, in fact be consigned to the Senate altogether. It would have the effect at the same time, he observed, of giving the nomination of the candidates to the largest States.

Mr. Govr. MORRIS concurred in, & enforced the remarks of Mr. Madison.

Mr. RANDOLPH & Mr. PINKNEY wished for a particular explanation & discussion of the reasons for changing the mode of electing the Executive.

Mr. Govr. MORRIS said he would give the reasons of the Committee and his own. The 1st. was the danger of intrigue & faction if the appointmt. should be made by the Legislature. 2. the inconveniency of an ineligibility required by that mode in order to lessen its evils. 3. The difficulty of establishing a Court of Impeachments, other than the Senate which would not be so proper for the trial nor the other branch for the impeachment of the President, if appointed by the Legislature, 4. No body had appeared to be satisfied with an appointment by the Legislature. 5. Many were anxious even for an immediate choice by the people. 6. the indispensible necessity of making the Executive independent of the Legislature. —As the Electors would vote at the same time throughout the U. S. and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible also to corrupt them. A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment.

Col: MASON confessed that the plan of the Committee had removed some capital objections, particularly the danger of cabal and corruption. It was liable however to this strong objection, that nineteen times in twenty the President would be chosen by the Senate, an improper body for the purpose

Mr. BUTLER thought the mode not free from objections, but much more so than an election by the Legislature, where as in elective monarchies, cabal faction & violence would be sure to prevail.

Mr. PINKNEY stated as objections to the mode 1. that it threw the whole appointment in fact into the hands of the Senate.

2. The Electors will be strangers to the several candidates and of course unable to decide on their comparative merits. 3. It makes the Executive reeligible which will endanger the public liberty. 4. It makes the same body of men which will in fact elect the President his Judges in case of an impeachment.

Mr. WILLIAMSON had great doubts whether the advantage of reeligibility would balance the objection to such a dependence of the President on the Senate for his reappointment. He thought at least the Senate ought to be restrained to the *two* highest on the list

Mr. Govr. MORRIS said the principal advantage aimed at was that of taking away the opportunity for cabal. The President may be made if thought necessary ineligible on this as well as on any other mode of election. Other inconveniences may be no less redressed on this plan than any other.

Mr. BALDWIN thought the plan not so objectionable when well considered, as at first view. The increasing intercourse among the people of the States, would render important characters less & less unknown; and the Senate would consequently be less & less likely to have the eventual appointment thrown into their hands.

Mr. WILSON. This subject has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide. He had never made up an opinion on it entirely to his own satisfaction. He thought the plan on the whole a valuable improvement on the former. It gets rid of one great evil, that of cabal & corruption; & Continental Characters will multiply as we more & more coalesce, so as to enable the electors in every part of the Union to know & judge of them. It clears the way also for a discussion of the question of reeligibility on its own merits, which the former mode of election seems to forbid. He thought it might be better however to refer the eventual appointment to the Legislature than to the Senate, and to confine it to a smaller number than five of the Candidates. The eventual election by the Legislature wd. not open cabal anew, as it would be restrained to certain designated objects of choice, and as these must have had the previous sanction of a number of the States: and if the election be made as it ought as soon as the

votes of the electors are opened & it is known that no one has a majority of the whole, there can be little danger of corruption. Another reason for preferring the Legislature to the Senate in this business, was that the House of Reps. will be so often changed as to be free from the influence & faction to which the permanence of the Senate may subject that branch.

Mr. RANDOLPH preferred the former mode of constituting the Executive, but if the change was to be made, he wished to know why the eventual election was referred to the Senate and not to the Legislature? He saw no necessity for this and many objections to it. He was apprehensive also that the advantage of the eventual appointment would fall into the hands of the States near the Seat of Government.

Mr. Govr. MORRIS said the Senate was preferred because fewer could then, say to the President, you owe your appointment to us. He thought the President would not depend so much on the Senate for his re-appointment as on his general good conduct.

The further consideration of the Report was postponed that each member might take a copy of the remainder of it.

The following motion was referred to the Committee of Eleven—to wit,—"To prepare & report a plan for defraying the expences of the Convention"

Mr. PINKNEY moved a clause declaring "that each House should be judge of the privilege of its own members.["] Mr. Govr. MORRIS 2ded. the motion

Mr. RANDOLPH & Mr. MADISON expressed doubts as to the propriety of giving such a power, & wished for a postponement.

Mr. Govr. MORRIS thought it so plain a case that no postponement could be necessary.

Mr. WILSON thought the power involved, and the express insertion of it needless. It might beget doubts as to the power of other public bodies, as Courts &c. Every Court is the judge of its own privileges.

Mr. MADISON distinguished between the power of Judging of privileges previously & duly established, and the effect of the motion which would give a discretion to each House as to the

extent of its own privileges. He suggested that it would be better to make provision for ascertaining by law, the privileges of each House, than to allow each House to decide for itself. He suggested also the necessity of considering what privileges ought to be allowed to the Executive.

Adjourned

Resource 22

September 5, 1787 Constitutional Convention

Wednesday, Sepr. 5, 1787
IN CONVENTION

....

The Report made yesterday as to the appointment of the Executive being taken up.

Mr. PINKNEY renewed his opposition to the mode, arguing 1. that the electors will not have sufficient knowledge of the fittest men, & will be swayed by an attachment to the eminent men of their respective States. Hence 2dly. the dispersion of the votes would leave the appointment with the Senate, and as the President's reappointment will thus depend on the Senate he will be the mere creature of that body. 3. He will combine with the Senate agst. the House of Representatives. 4. This change in the mode of election was meant to get rid of the ineligibility of the President a second time, whereby he will become fixed for life under the auspices of the Senate

Mr. GERRY did not object to this plan of constituting the Executive in itself, but should be governed in his final vote by the powers that may be given to the President.

Mr. RUTLIDGE was much opposed to the plan reported by the Committee. It would throw the whole power into the Senate. He was also against a re-eligibility. He moved to postpone the Report under consideration & take up the original plan of appointment by the Legislature, to wit. "He shall be elected by joint ballot by the Legislature to which election a majority of the votes of the members present shall be required: He shall hold his office during the term of seven years; but shall not be elected a second time."

On this motion to postpone

N. H. divd. Mas. no. Ct. no. N. J. no. Pa. no. Del. no. Md. no. Va. no. N. C. ay. S. C. ay. Geo. no. [Ayes—2; noes—8; divided—1.]

Col. MASON admitted that there were objections to an appointment by the Legislature as originally planned. He had not yet made up his mind, but would state his objections to the mode proposed by the Committee. 1. It puts the appointment in fact into the hands of the Senate, as it will rarely happen that a majority of the whole votes will fall on any one candidate: and as the Existing President will always be one of the 5 highest, his reappointment will of course depend on the Senate. 2. Considering the powers of the President & those of the Senate, if a coalition should be established between these two branches, they will be able to subvert the Constitution.—The great objection with him would be removed by depriving the Senate of the eventual election. He accordingly moved to strike out the words "if such number be a majority of that of the electors."

Mr. WILLIAMSON 2ded. the motion. He could not agree to the clause without some such modification. He preferred making the highest tho' not having a majority of the votes, President, to a reference of the matter to the Senate. Referring the appointment to the Senate lays a certain foundation for corruption & aristocracy.

Mr. Govr. MORRIS thought the point of less consequence than it was supposed on both sides. It is probable that a majority of votes will fall on the same man. As each elector is to give two votes, more than 1/4 will give a majority. Besides as one vote is to be given to a man out of the State, and as this vote will not be thrown away, 1/2 the votes will fall on characters eminent & generally known. Again if the President shall have given satisfaction, the votes will turn on him of course, and a majority of them will reappoint him, without resort to the Senate: If he should be disliked, all disliking him, would take care to unite their votes so as to ensure his being supplanted.

Col. MASON those who think there is no danger of there not being a majority for the same person in the first instance, ought to give up the point to those who think otherwise.

Mr. SHERMAN reminded the opponents of the new mode proposed that if the small states had the advantage in the Senate's deciding among the five highest candidates, the large States would have in fact the nomination of these candidates

On the motion of Col: Mason

N. H. no. Mas. no. Ct. no. N. J. no. Pa. no. Del. no. Md. ay. Va. no. N. C. ay. S. C. no. Geo. no. [Ayes—2; noes—9.] (in printed Journal Maryland—no)

Mr. WILSON moved to strike out "Senate" and insert the word "Legislature"

Mr. MADISON considered it as a primary object to render an eventual resort to any part of the Legislature improbable. He was apprehensive that the proposed alteration would turn the attention of the large States too much to the appointment of candidates, instead of aiming at an effectual appointment of the officer, as the large States would predominate in the Legislature which would have the final choice out of the Candidates. Whereas if the Senate in which the small States predominate should have this final choice, the concerted effort of the large States would be to make the appointment in the first instance conclusive.

Mr. RANDOLPH. We have in some revolutions of this plan made a bold stroke for Monarchy. We are now doing the same for an aristocracy. He dwelt on the tendency of such an influence in the Senate over the election of the President in addition to its other powers, to convert that body into a real & dangerous Aristocracy.

Mr. DICKINSON was in favor of giving the eventual election to the Legislature, instead of the Senate. It was too much influence to be superadded to that body.

On the question moved by Mr. Wilson

N. H. divd. Mas. no. Ct. no. N. J. no. Pa. ay. Del. no. Md. no. Va. ay. N. C. no. S. C. ay. Geo. no. [Ayes—3; noes—7; divided 1.]

Mr. MADISON & Mr. WILLIAMSON moved to strike out the word "majority" and insert "one third" so that the eventual power might not be exercised if less than a majority, but not less than 1/3 of the Electors should vote for the same person.

Mr. GERRY objected that this would put it in the power of three or four States to put in whom they pleased.

Mr. WILLIAMSON. There are seven States which do not contain one third of the people. If the Senate are to appoint, less than one sixth of the people will have the power.

On the question

N. H. no. Mas. no. Ct. no. N. J. no. Pa. no. Del. no. Md. no. Va. ay. N. C. ay. S. C. no. Geo. no. [Ayes—2; noes—9.]

Mr. GERRY suggested that the eventual election should be made by six Senators and seven Representatives chosen by joint ballot of both Houses.

Mr. KING observed that the influence of the Small States in the Senate was somewhat balanced by the influence of the large States in bringing forward the candidates; and also by the Concurrence of the small States in the Committee in the clause vesting the exclusive origination of Money bills in the House of Representatives.

Col: MASON moved to strike out the word "five" and insert the word "three" as the highest candidates for the Senate to choose out of.

Mr. GERRY 2ded. the motion

Mr. SHERMAN would sooner give up the plan. He would prefer seven or thirteen.

On the question moved by Col: Mason & Mr. Gerry

N. H. no. Mas. no. Ct. no. N. J. no. Pa. no. Delaware Md. no. Va. ay. N. C. ay. S. C. no. Geo. no. [Ayes—2; noes—8.]

Mr. SPAIGHT and Mr. RUTLIDGE moved to strike out "five" and insert "thirteen"—to which all the States disagreed—except N. C. & S. C.

Mr. MADISON & Mr. WILLIAMSON moved to insert after "Electors" the words "who shall have balloted" so that the non voting electors not being counted might not increase the number necessary as a majority of the whole, to decide the choice without the agency of the Senate.

On this question

N. H. no. Mas. no. Ct. no. N. J. no. Pa. ay. Del. no. Md. ay. Va. ay. N. C. ay. S. C. no. Geo. no. [Ayes—4; noes—7.]

Mr. DICKINSON moved, in order to remove ambiguity from the intention of the clause as explained by the vote, to add,

after the words "if such number be a majority of the whole number of the electors" the word "appointed"

On this motion

N. H. ay. Mas. ay. Con: ay. N. J. ay. Pa. ay. Delaware Md. ay. Va. no. N. C. no. S. C. ay. Geo. ay. [Ayes—8; noes—2.]

Col: MASON. As the mode of appointment is now regulated, he could not forbear expressing his opinion that it is utterly inadmissible. He would prefer the Government of Prussia to one which will put all power into the hands of seven or eight men, and fix an Aristocracy worse than absolute monarchy.

The words "and of their giving their votes" being inserted on motion for that purpose, after the words "The Legislature may determine the time of chusing and assembling the electors."

The House adjourned

Resource 23

September 6, 1787 Constitutional Convention

Thursday September 6, 1787
IN CONVENTION

Mr. KING and Mr. GERRY moved to insert in the (5) clause of the Report (see Sepr. 4) after the words "may be entitled in the Legislature" the words following—"But no person shall be appointed an elector who is a member of the Legislature of the U. S. or who holds any office of profit or trust under the U. S." which passed nem: con:

Mr. GERRY proposed, as the President was to be elected by the Senate out of the five highest candidates, that if he should not at the end of his term be re-elected by a majority of the Electors, and no other candidate should have a majority, the eventual election should be made by the Legislature. This he said would relieve the President from his particular dependence on the Senate for his continuance in office.

Mr. KING liked the idea, as calculated to satisfy particular members & promote unanimity, & as likely to operate but seldom.

Mr. READ opposed it, remarking that if individual members were to be indulged, alterations would be necessary to satisfy most of them.

Mr. WILLIAMSON espoused it as a reasonable precaution against the undue influence of the Senate.

Mr. SHERMAN liked the arrangement as it stood, though he should not be averse to some amendments. He thought he said that if the Legislature were to have the eventual appointment instead of the Senate, it ought to vote in the case by States, in favor of the small States, as the large States would have so great an advantage in nominating the candidates.

Mr. Govr. MORRIS thought favorably of Mr. Gerry's proposition. It would free the President from being tempted in naming to Offices, to Conform to the will of the Senate, & thereby virtually give the appointments to office, to the Senate.

Mr. WILSON said that he had weighed carefully the report of the Committee for remodelling the constitution of the Executive; and on combining it with other parts of the plan, he was obliged to consider the whole as having a dangerous tendency to aristocracy; as throwing a dangerous power into the hands of the Senate. They will have in fact, the appointment of the President, and through his dependence on them, the virtual appointment to offices; among others the offices of the Judiciary Department. They are to make Treaties; and they are to try all impeachments. In allowing them thus to make the Executive & Judiciary appointments, to be the Court of impeachments, and to make Treaties which are to be laws of the land, the Legislative, Executive & Judiciary powers are all blended in one branch of the Government. The power of making Treaties involves the case of subsidies, and here as an additional evil, foreign influence is to be dreaded. According to the plan as it now stands, the President will not be the man of the people as he ought to be, but the Minion of the Senate. He cannot even appoint a tide-waiter without the Senate. He had always thought the Senate too numerous a body for making appointments to office. The Senate, will moreover in all probability be in constant Session. They will have high salaries. And with all those powers, and the President in their interest, they will depress the other branch of the Legislature, and aggrandize themselves in proportion. Add to all this, that the Senate sitting in conclave, can by holding up to their respective States various and improbable candidates, contrive so to scatter their votes, as to bring the appointment of the President ultimately before themselves. Upon the whole, he thought the new mode of appointing the President, with some amendments, a valuable improvement; but he could never agree to purchase it at the price of the ensuing parts of the Report, nor befriend a system of which they make a part.

Mr. Govr. MORRIS expressed his wonder at the observations of Mr. Wilson so far as they preferred the plan in the printed

Report to the new modification of it before the House, and entered into a comparative view of the two, with an eye to the nature of Mr. Wilsons objections to the last. By the first the Senate he observed had a voice in appointing the President out of all the Citizens of the U. S.—by this they were limited to five candidates previously nominated to them, with a probability of being barred altogether by the successful ballot of the Electors. Here surely was no increase of power. They are now to appoint Judges nominated to them by the President. Before they had the appointment without any agency whatever of the President. Here again surely no additional power. If they are to make Treaties as the plan now stands, the power was the same in the printed plan. If they are to try impeachments, the Judges must have been triable by them before. Wherein then lay the dangerous tendency of the innovations to establish an aristocracy in the Senate? As to the appointment of officers, the weight of sentiment in the House, was opposed to the exercise of it by the President alone; though it was not the case with himself. If the Senate would act as was suspected, in misleading the States into a fallacious disposition of their votes for a President, they would, if the appointment were withdrawn wholly from them, make such representations in their several States where they have influence, as would favor the object of their partiality.

Mr. WILLIAMSON. replying to Mr. Morris: observed that the aristocratic complexion proceeds from the change in the mode of appointing the President which makes him dependent on the Senate.

Mr. CLYMER said that the aristocratic part to which he could never accede was that in the printed plan, which gave the Senate the power of appointing to offices.

Mr. HAMILTON said that he had been restrained from entering into the discussions by his dislike of the Scheme of Govt. in General; but as he meant to support the plan to be recommended, as better than nothing, he wished in this place to offer a few remarks. He liked the new modification, on the whole, better than that in the printed Report. In this the President was a Monster elected for seven years, and ineligible afterwards; having great powers, in appointments to office, & continually tempted by this

constitutional disqualification to abuse them in order to subvert the Government. Although he should be made re-eligible, still if appointed by the Legislature, he would be tempted to make use of corrupt influence to be continued in office. It seemed peculiarly desireable therefore that some other mode of election should be devised. Considering the different views of different States, & the different districts Northern Middle & Southern, he concurred with those who thought that the votes would not be concentered, and that the appointment would consequently in the present mode devolve on the Senate. The nomination to offices will give great weight to the President. Here then is a mutual connection & influence, that will perpetuate the President, and aggrandize both him & the Senate. What is to be the remedy? He saw none better than to let the highest number of ballots, whether a majority or not, appoint the President. What was the objection to this? Merely that too small a number might appoint. But as the plan stands, the Senate may take the candidate having the smallest number of votes, and make him President.

Mr. SPAIGHT & Mr. WILLIAMSON moved to insert "seven" instead of "four" years for the term of the President-

On this motion

N. H. ay. Mas. no. Ct. no. N. J. no. Pa. no. Del. no. Md. no. Va. ay. N. C. ay. S. C. no. Geo. no. [Ayes—3; noes—8.]

Mr. SPAIGHT & Mr. WILLIAMSON, then moved to insert "six" instead of "four."

On which motion

N. H. no. Mas. no. Ct. no. N. J. no. Pa. no. Del. no. Md. no. Va. no. N. C. ay. S. C. ay. Geo. no. [Ayes—2; noes—9.]

On the term "four" all the States were ay, except N. Carolina, no.

On the question (Clause 4. in the Report) for Appointing President by electors—down to the words,—[“]entitled in the Legislature" inclusive.

N. H. ay. Mas: ay. Cont. ay. N. J. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N. C. no. S. C. no. Geo. ay. [Ayes—9; noes—2.]

It was moved that the Electors meet at the seat of the Genl. Govt. which passed in the Negative. N. C. only being ay.

It was moved to insert the words "under the seal of the State" after the word "transmit" in 4th clause of the Report which was disagreed to; as was another motion to insert the words "and who shall have given their votes" after the word "appointed" in the 4th. Clause of the Report as added yesterday on motion of Mr. Dickinson.

On several motions, the words "in presence of the Senate and House of Representatives" were inserted after the word "counted" and the word "immediately" before the word "choose"; and the words "of the Electors" after the word "votes."

Mr. SPAIGHT said if the election by Electors is to be crammed down, he would prefer their meeting altogether and deciding finally without any reference to the Senate and moved "That the Electors meet at the seat of the General Government."

Mr. WILLIAMSON 2ded. the motion, on which all the States were in the negative except N: Carolina.

On motion the words "But the election shall be on the same day throughout the U. S." were added after the words "transmitting their votes."

N. H. ay. Mas. no. Ct. ay. N. J. no. Pa. ay. Del. no. Md. ay. Va. ay. N. C. ay. S.C. ay. Geo. ay. [Ayes—8; noes—3.]

On a question on the sentence in clause (4). "if such number be a majority of that of the Electors appointed."

N. H. ay. Mas. ay. Ct. ay. N. J. ay. Pa. no. Del. ay. Md. ay. Va. no. N. C. no. S. C. ay. Geo. ay. [Ayes—8; noes—3.]

On a question on the clause referring the eventual appointment of the President to the Senate

N. H. ay. Mas. ay. Ct. ay. N. J. ay. Pa. ay. Del. ay. Va. ay. N. C. no. Here the call ceased.

Mr. MADISON made a motion requiring 2/3 at least of the Senate to be present at the choice of a President. Mr. PINKNEY 2ded. the motion

Mr. GORHAM thought it a wrong principle to require more than a majority in any case. In the present case it might prevent for a long time any choice of a President.

On the question moved by Mr. M. & Mr. P.

N. H. ay: Mas. abst. Ct. no. N. J. no. Pa. no. Del. no. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes—6; noes—4; absent—1.]

Mr. WILLIAMSON suggested as better than an eventual choice by the Senate, that this choice should be made by the Legislature, voting *by States* and not *per capita*.

Mr. SHERMAN suggested the House of Reps as preferable to the Legislature, and moved, accordingly,

To strike out the words "The Senate shall immediately choose &c." and insert "The House of Representatives shall immediately choose by ballot one of them for President, the members from each State having one vote."

Col: MASON liked the latter mode best as lessening the aristocratic influence of the Senate.

On the Motion of Mr. Sherman

N. H. ay. Mas. ay. Ct. ay. N. J. ay. Pa. ay. Del. no. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes—10; noes—1.]

Mr. Govr. MORRIS suggested the idea of providing that in all cases, the President in office, should not be one of the five Candidates; but be only re-eligible in case a majority of the electors should vote for him. (This was another expedient for rendering the President independent of the Legislative body for his continuance in office.)

Mr. MADISON remarked that as a majority of members wd. make a quorum in the H. of Reps. it would follow from the amendment of Mr. Sherman giving the election to a majority of States, that the President might be elected by two States only, Virga. & Pena. which have 18 members, if these States alone should be present

On a motion that the eventual election of Presidt. in case of an equality of the votes of the electors be referred to the House of Reps.

N. H. ay. Mas. ay. N. J. no. Pa. ay. Del. no. Md. no. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes—8; noes—3.]

Mr. KING moved to add to the amendment of Mr. Sherman "But a quorum for this purpose shall consist of a member or members from two thirds of the States," and ["]also of a majority of the whole number of the House of Representatives."

Col: MASON liked it as obviating the remark of Mr. Madison—The motion as far as "States" inclusive was agd. to.

On the residue to wit, "and also of a majority of the whole number of the House of Reps.["] it passed in the Negative.

N. H. no. Mas. ay. Ct. ay. N. J. no. Pa. ay. Del. no. Md. no. Va. ay. N. C. ay. S. C. no. Geo. no. [Ayes—5; noes—6.]

The Report relating to the appointment of the Executive stands as amended, as follows,

"He shall hold his office during the term of four years, and together with the vice-President, chosen for the same term, be elected in the following manner.

Each State shall appoint in such manner as its Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives, to which the State may be entitled in the Legislature:

But no person shall be appointed an Elector who is a member of the Legislature of the U. S. or who holds any office of profit or trust under the U. S.

The Electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves; and they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the Seat of the General Government, directed to the President of the Senate.

The President of the Senate shall in the presence of the Senate and House of Representatives open all the certificates & the votes shall then be counted.

The person having the greatest number of votes shall be the President (if such number be a majority of the whole number of electors appointed) and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President, the Representation from each State having one vote. But if no person have a majority, then from the five highest on the list, the House of Representatives shall in like manner choose by ballot the President. In the choice of a President by the House of

Representatives, a Quorum shall consist of a member or members from two thirds of the States (and the concurrence of a majority of all the States shall be necessary to such choice.) -And in every case after the choice of the President, the person having the greatest number of votes of the Electors shall be the vice-president: But, if there should remain two or more who have equal votes, the Senate shall choose from them the vice-President.

The Legislature may determine the time of choosing the Electors, and of their giving their votes; and the manner of certifying and transmitting their votes—But the election shall be on the same day throughout the U. States."

Adjourned

Resource 24

September 7, 1787 Constitutional Convention

Friday September 7, 1787
IN CONVENTION

The mode of constituting the Executive being resumed, Mr. RANDOLPH moved, to insert in the first Section of the report made yesterday

"The Legislature may declare by law what officer of the U. S. shall act as President in case of the death, resignation, or disability of the President and Vice-President; and such officer shall act accordingly until the time of electing a President shall arrive."

Mr. MADISON observed that this, as worded, would prevent a supply of the vacancy by an intermediate election of the President, and moved to substitute — "until such disability be removed, or a President shall be elected —"

Mr. GOVERNr. MORRIS 2ded. the motion, which was agreed to.

It seemed to be an objection to the provision with some, that according to the process established for chusing the Executive there would be difficulty in effecting it at other than the fixed periods; with others, that the Legislature was restrained in the temporary appointment to "*officers*" of the *U. S*: They wished it to be at liberty to appoint others than such.

On the Motion of Mr. Randolph as amended, it passed in the affirmative

N. H. divided. Mas. no. Ct. no. N. J. ay. Pa. ay. Del. no. Md. ay. Va. ay. N. C. no. S. C. ay. Geo. ay. [Ayes — 6; noes — 4; divided — 1.]

Mr. GERRY moved "that in the election of President by the House of Representatives, no State shall vote by less than three members, and where that number may not be allotted to a State, it shall be made up by its Senators; and a concurrence of a majority

of all the States shall be necessary to make such choice." Without some such provision five individuals might possibly be competent to an election; these being a majority of two thirds of the existing number of States; and two thirds being a quorum for this business.

Mr. MADISON 2ded. the motion

Mr. READ observed that the States having but one member only in the House of Reps. would be in danger of having no vote at all in the election: the sickness or absence either of the Representative or one of the Senators would have that effect.

Mr. MADISON replied that, if one member of the House of Representatives should be left capable of voting for the State, the states having one Representative only would still be subject to that danger. He thought it an evil that so small a number at any rate should be authorized, to elect. Corruption would be greatly facilitated by it. The mode itself was liable to this further weighty objection that the representatives of a *Minority* of the people, might reverse the choice of a *majority* of the *States* and of the *people*. He wished some cure for this inconveniency might yet be provided.

Mr. GERRY withdrew the first part of his motion; and on the, —…

Question on the 2d. part viz. "and a concurrence of a majority of all the States shall be necessary to make such choice" to follow the words "a member or members from two thirds of the States" — It was agreed to nem: con:

The section 2 (see Sepr. 4) requiring that the President should be a natural-born Citizen, &c & have been resident for fourteen years, & be thirty five years of age, was agreed to nem: con:

Section 3. (see Sepr. 4). "The vice President shall be ex-officio President of the Senate"

Mr. GERRY opposed this regulation. We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper. He was agst. having any vice President.

Mr. Govr. MORRIS. The vice president then will be the first heir apparent that ever loved his father. If there should be no vice president, the President of the Senate would be temporary successor, which would amount to the same thing.

Mr. SHERMAN saw no danger in the case. If the vice-President were not to be President of the Senate, he would be without employment, and some member by being made President must be deprived of his vote, unless when an equal division of votes might happen in the Senate, which would be but seldom.

Mr. RANDOLPH concurred in the opposition to the clause.

Mr. WILLIAMSON, observed that such an officer as vice-President was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time.

Col: MASON, thought the office of vice-President an encroachment on the rights of the Senate; and that it mixed too much the Legislative & Executive, which as well as the Judiciary departments, ought to be kept as separate as possible. He took occasion to express his dislike of any reference whatever of the power to make appointments to either branch of the Legislature. On the other hand he was averse to vest so dangerous a power in the President alone. As a method for avoiding both, he suggested that a privy Council of six members to the president should be established; to be chosen for six years by the Senate, two out of the Eastern two out of the middle, and two out of the Southern quarters of the Union, & to go out in rotation two every second year; the concurrence of the Senate to be required only in the appointment of Ambassadors, and in making treaties, which are more of a legislative nature. This would prevent the constant sitting of the Senate which he thought dangerous, as well as keep the departments separate & distinct. It would also save the expence of constant sessions of the Senate. He had he said always considered the Senate as too unwieldy & expensive for appointing officers, especially the smallest, such as tide waiters &c. He had not reduced his idea to writing, but it could be easily done if it should be found acceptable.

On the question shall the vice President be ex officio President of the Senate?

N. H. ay. Mas. ay. Ct. ay. N. J. no. Pa. ay. Del ay. Mas no. Va. ay. N. C. abst. S. C. ay. Geo. ay. [Ayes — 8; noes — 2; absent — 1.]

The other parts of the same Section (3) were then agreed to.

….

Resource 25

September 12, 1787 Constitutional Convention

Wednesday September 12, 1787
IN CONVENTION

Docr. JOHNSON from the Committee of stile &c. reported a digest of the plan, of which printed copies were ordered to be furnished to the members. He also reported a letter to accompany the plan, to Congress. (Here insert a transcript of the former from the annexed sheet as *printed* and of the latter from the draft as finally agreed to.)

WE, THE PEOPLE OF THE UNITED STATES, IN ORDER TO FORM a more perfect union, to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

….

II

Sect. 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected in the following manner:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in Congress: but no senator or representative shall be appointed an elector, nor any person holding an office of trust or profit under the United States.

The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the general government, directed to the president of the senate. The president of the senate shall in the presence of the senate and house of representatives open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately chuse by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states and not per capita, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president by the representatives, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.

The Congress may determine the time of chusing the electors, and the time in which they shall give their votes; but the election shall be on the same day throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and

the Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for chusing another president arrive.

The president shall, at stated times, receive a fixed compensation for his services, which shall neither be encreased nor diminished during the period for which he shall have been elected.

Before he enter on the execution of his office, he shall take the following oath or affirmation: "I --------, do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my judgment and power, preserve, protect and defend the constitution of the United States."

Sect. 2. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several States: he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, when called into the actual service of the United States, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

Sect. 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient: he may, on extraordinary occasions, convene both houses, or either of

them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper: he shall receive ambassadors and other public ministers: he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Sect. 4. The president, vice-president and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.

….

V

The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this constitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the ----- and ----- section of ----- article

….

VII

The ratification of the conventions of nine States, shall be sufficient for the establishment of this constitution between the States so ratifying the same.

….

Resource 26

September 15, 1787 Constitutional Convention

Saturday Sepr. 15, 1787
IN CONVENTION

….
Art II. sect. 1. (paragraph 6) "or the period for chusing another president arrive" was changed into "or a President shall be elected" conformably to a vote of the ----- day of
….
Art II. Sect. 1. The words, "and not per capita" — were struck out as superfluous — and the words "by the Representatives" also — as improper, the choice of a President being in another mode as well as eventually by the House of Reps.
….
On the question to agree to the Constitution, as amended. All the States ay.

The Constitution was then ordered to be engrossed.

….

Resource 27

Delegates' Speeches, Motions, and Committee Assignments in the Constitutional Convention

Delegate, State	Speeches	Motions	Committees
1. James Wilson, Pennsylvania	172	49	2
2. Gouverneur Morris, Pennsylvania	171	78	4
3. James Madison, Virginia	167	72	4
4. Roger Sherman, Connecticut	131	46	4
5. George Mason, Virginia	127	36	4
6. Elbridge Gerry, Massachusetts	113	55	1
7. Edmund Randolph, Virginia	79	44	3
8. Rufus King, Massachusetts	78	22	6
9. Hugh Williamson, North Carolina	77	35	5
10. Charles Pinckney, South Carolina	74	58	1
11. Oliver Ellsworth, Connecticut	72	28	2
12. Nathaniel Gorham, Massachusetts	69	12	4
13. John Rutledge, South Carolina	52	38	5
14. Pierce Butler, South Carolina	52	23	2
15. John Dickinson, Delaware	47	21	4
16. Luther Martin, Maryland	38	23	2
17. Charles Cotesworth Pinckney, South Carolina	34	20	2
18. Benjamin Franklin, Pennsylvania	27	13	2
19. George Read, Delaware	26	12	2
20. Alexander Hamilton, New York	25	11	2
21. John Langdon, New Hampshire	25	4	3
22. Daniel Carroll, Maryland	23	17	3
23. John Francis Mercer, Maryland	20	4	0
24. William Samuel Johnson, Connecticut	16	7	4
25. William Paterson, New Jersey	12	5	1

26. Jonathan Dayton, New Jersey	12	7	1
27. Gunning Bedford, Jr., Delaware	10	3	1
28. Caleb Strong, Massachusetts	9	3	0
29. Abraham Baldwin, Georgia	8	2	4
30. George Clymer, Pennsylvania	7	2	2
31. David Brearley, New Jersey	6	4	2
32. Jacob Broom, Delaware	5	11	0
33. William R. Davie, North Carolina	5	2	1
34. James McHenry, Maryland	5	7	1
35. Thomas FitzSimons, Pennsylvania	5	2	1
36. Richard Dobbs Spaight, North Carolina	4	13	0
37. John Lansing, Jr., New York	4	3	0
38. Daniel of St. Thomas Jenifer, Maryland	4	2	0
39. George Wythe, Virginia	4	0	1
40. William Houstoun, Georgia	3	6	1
41. James McClurg, Virginia	3	2	0
42. William Pierce, Georgia	3	1	0
43. George Washington, Virginia	2	0	0
44. Jared Ingersoll, Pennsylvania	2	0	0
45. William Livingston, New Jersey	2	0	3
46. Robert Morris, Pennsylvania	1	2	0
47. William Blount, North Carolina	1	0	0
48. William Few, Georgia	0	0	1
49. Nicholas Gilman, New Hampshire	0	0	1
50. Alexander Martin, North Carolina	0	3	0
51. Thomas Mifflin, Pennsylvania	0	1	0
52. Robert Yates, New York	0	0	2
53. Richard Bassett, Delaware	0	0	0
54. William Churchill Houston, New Jersey	0	0	0
55. John Blair, Virginia	0	0	0
Total Number of Speeches	1832		

Resource 28

Article II of the U.S. Constitution

Section 1- President: his term of office. Electors of President; number and how appointed. Electors to vote on same day. Qualification of President. On whom his duties devolve in case of his removal, death, etc. President's compensation. His oath of office.

1. The Executive power shall be vested in a President of the United States of America. He shall hold office during the term of four years, and together with the Vice President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the Legislature may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. *The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for each; which list they shall sign and certify, and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from*

each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President. [The clause in italics was superseded by Ammendment XII.]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born Citizen, or a Citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected. [This clause has been modified by Amendment XX and Amendment XXV.]

6. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation:
"I do solemnly swear (or affirm) that I will faithfully execute the

office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Section 2 - President to be Commander-in-Chief. He may require opinions of cabinet officers, etc., may pardon. Treaty-making power. Nomination of certain officers. When President may fill vacancies.

1. The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have the power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

Section 3 - President shall communicate to Congress. He may convene and adjourn Congress, in case of disagreement, etc. Shall receive ambassadors, execute laws, and commission officers.

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he may receive ambassadors, and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4 - All civil offices forfeited for certain crimes.

The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

Resource 29

Article V of the U.S. Constitution

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Resource 30

Article VII of the U.S. Constitution

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Resource 31

General Ratification Chronology, 1786–1939

1786

21 January	Virginia calls meeting to consider granting Congress power to regulate trade.
11–14 September	Annapolis Convention.
20 September	Congress receives Annapolis Convention report recommending that states elect delegates to a convention at Philadelphia in May 1787.
11 October	Congress appoints committee to consider Annapolis Convention report.
23 November	Virginia authorizes election of delegates to Convention at Philadelphia.
23 November	New Jersey elects delegates.
4 December	Virginia elects delegates.
30 December	Pennsylvania elects delegates.

1787

6 January	North Carolina elects delegates.
17 January	New Hampshire elects delegates.
3 February	Delaware elects delegates.
10 February	Georgia elects delegates.
21 February	Congress calls Constitutional Convention.
22 February	Massachusetts authorizes election of delegates.
28 February	New York authorizes election of delegates.
3 March	Massachusetts elects delegates.
6 March	New York elects delegates.
8 March	South Carolina elects delegates.
14 March	Rhode Island refuses to elect delegates.
23 April–26 May	Maryland elects delegates.

5 May	Rhode Island again refuses to elect delegates.
14 May	Convention meets; quorum not present.
14–17 May	Connecticut elects delegates.
25 May	Convention begins with quorum of seven states.
16 June	Rhode Island again refuses to elect delegates.
27 June	New Hampshire renews election of delegates.
13 July	Congress adopts Northwest Ordinance.
6 August	Committee of Detail submits draft constitution to Convention.
12 September	Committee of Style submits draft constitution to Convention.
17 September	Constitution signed and Convention adjourns *sine die*.
20 September	Congress reads Constitution.
26–28 September	Congress debates Constitution.
28 September	Congress transmits Constitution to the states.
28–29 September	Pennsylvania calls state convention.
17 October	Connecticut calls state convention.
25 October	Massachusetts calls state convention.
26 October	Georgia calls state convention.
31 October	Virginia calls state convention.
1 November	New Jersey calls state convention.
6 November	Pennsylvania elects delegates to state convention.
10 November	Delaware calls state convention.
12 November	Connecticut elects delegates to state convention.
19 November–7 January 1788	Massachusetts elects delegates to state convention.
20 November–15 December	Pennsylvania Convention.

26 November	Delaware elects delegates to state convention.
27 November–1 December	Maryland calls state convention.
27 November–1 December	New Jersey elects delegates to state convention.
3–7 December	Delaware Convention.
4–5 December	Georgia elects delegates to state convention.
6 December	North Carolina calls state convention.
7 December	Delaware Convention ratifies Constitution, 30 to 0.
11–20 December	New Jersey Convention.
12 December	Pennsylvania Convention ratifies Constitution, 46 to 23.
14 December	New Hampshire calls state convention.
18 December	New Jersey Convention ratifies Constitution, 38 to 0.
25 December–5 January 1788	Georgia Convention.
31 December	Georgia Convention ratifies Constitution, 26 to 0.
31 December–12 February 1788	New Hampshire elects delegates to state convention.

1788

3–9 January	Connecticut Convention.
9 January	Connecticut Convention ratifies Constitution, 128 to 40.
9 January–7 February	Massachusetts Convention.
19 January	South Carolina calls state convention.
1 February	New York calls state convention.

6 February	Massachusetts Convention ratifies Constitution, 187 to 168, and proposes amendments.
13–22 February	New Hampshire Convention: first session.
1 March	Rhode Island calls statewide referendum on Constitution.
3–27 March	Virginia elects delegates to state convention.
24 March	Rhode Island referendum: voters reject Constitution, 2,711 to 239.
28–29 March	North Carolina elects delegates to state convention.
7 April	Maryland elects delegates to state convention.
11–12 April	South Carolina elects delegates to state convention.
21–29 April	Maryland Convention.
26 April	Maryland Convention ratifies Constitution, 63 to 11.
29 April–3 May	New York elects delegates to state convention.
12–24 May	South Carolina Convention.
23 May	South Carolina Convention ratifies Constitution, 149 to 73, and proposes amendments.
2–27 June	Virginia Convention.
17 June–26 July	New York Convention.
18–21 June	New Hampshire Convention: second session.
21 June	New Hampshire Convention ratifies Constitution, 57 to 47, and proposes amendments.
25 June	Virginia Convention ratifies Constitution, 89 to 79.
27 June	Virginia Convention proposes amendments.

2 July	New Hampshire ratification read in Congress; Congress appoints committee to report an act for putting the Constitution into operation.
21 July–4 August	First North Carolina Convention.
26 July	New York Convention Circular Letter calls for second constitutional convention.
26 July	New York Convention ratifies Constitution, 30 to 27, and proposes amendments.
2 August	North Carolina Convention proposes amendments and refuses to ratify until amendments are submitted to Congress and to a second constitutional convention.
13 September	Congress sets dates for election of President and meeting of new government under the Constitution.
20 November	Virginia requests Congress under the Constitution to call a second constitutional convention.
30 November	North Carolina calls second state convention.

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7 February	New York requests Congress under the Constitution to call a second constitutional convention.
4 March	First Federal Congress convenes.
1 April	House of Representatives attains quorum.
6 April	Senate attains quorum.
30 April	George Washington inaugurated first President.
4 May	Virginia's resolution read in House of Representatives.
5 May	New York resolution read in House of Representatives.

8 June	James Madison proposes Bill of Rights in Congress.
21–22 August	North Carolina elects delegates to second state convention.
24–26 September	Congress adopts twelve amendments to Constitution to be submitted to the states.
16–23 November	Second North Carolina Convention.
20 November	New Jersey ratifies proposed amendments.
21 November	Second North Carolina Convention ratifies Constitution, 194 to 77, and proposes amendments.
19 December	Maryland ratifies proposed amendments.
22 December	North Carolina ratifies proposed amendments.

1790

17 January	Rhode Island calls state convention.
19 January	South Carolina ratifies proposed amendments.
25 January	New Hampshire ratifies proposed amendments.
28 January	Delaware ratifies proposed amendments.
8 February	Rhode Island elects delegates to state convention.
27 February	New York ratifies proposed amendments.
1–6 March	Rhode Island Convention: first session.
10 March	Pennsylvania ratifies proposed amendments.
24–29 May	Rhode Island Convention: second session.
29 May	Rhode Island Convention ratifies Constitution, 34 to 32, and proposes amendments.
11 June	Rhode Island ratifies proposed amendments.

1791

6–10 January	Vermont Convention.
10 January	Vermont Convention ratifies Constitution.
18 February	Vermont admitted to the Union.
3 November	Vermont ratifies proposed amendments.
15 December	Virginia ratifies proposed amendments.
15 December	Bill of Rights adopted.

1792

1 March	Secretary of State Thomas Jefferson notifies states of the adoption of ten amendments.

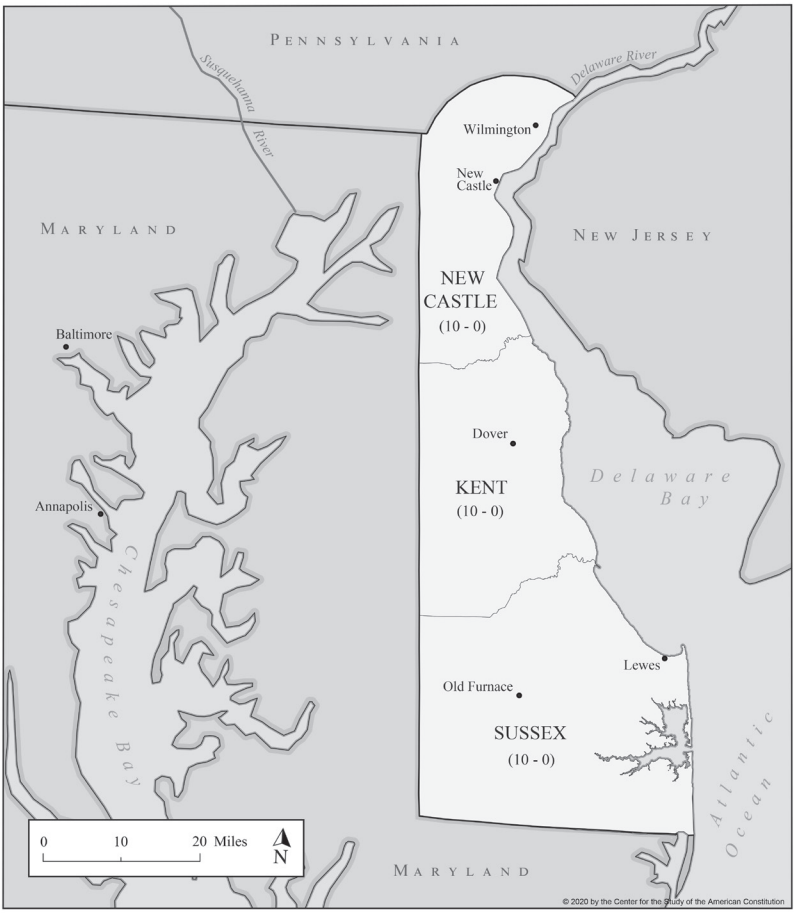
1939

2 March	Massachusetts adopts Bill of Rights.
18 March	Georgia adopts Bill of Rights.
13 April	Connecticut adopts Bill of Rights.

Resource 32

Delaware Ratified the Constitution

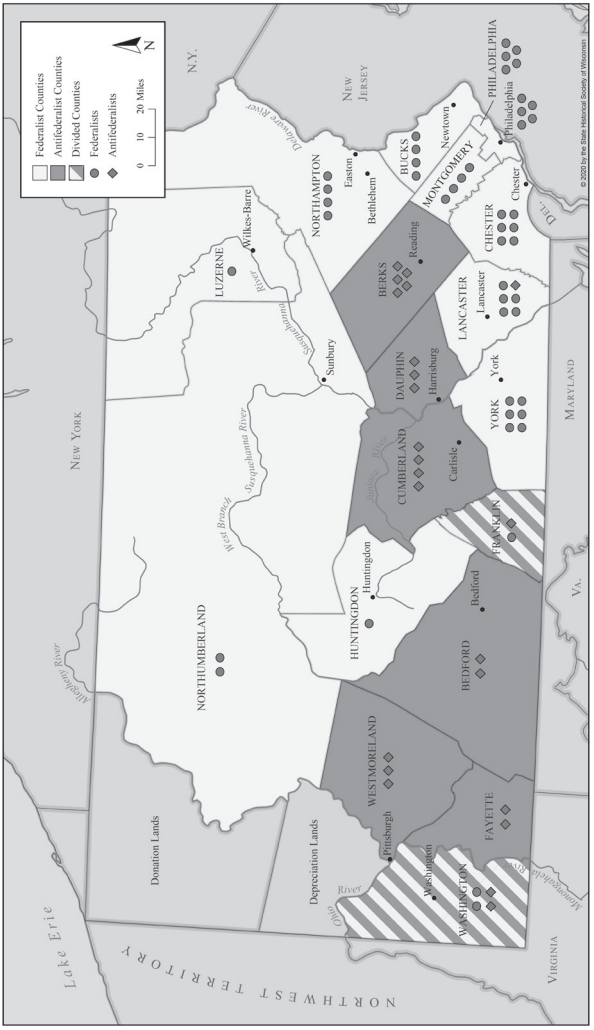
7 December 1787 (30 Yea - 0 Nay)



Resource 33

Pennsylvania Ratifies the Constitution

12 December 1787 (46 Yea-23 Nay)



Resource 34

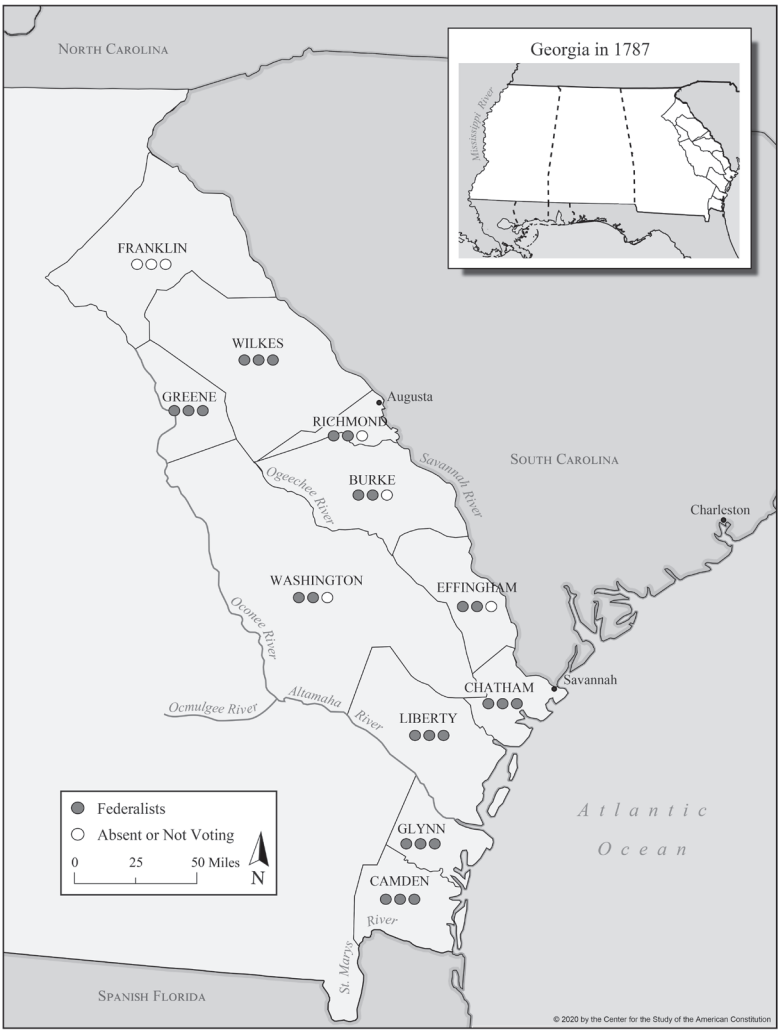
New Jersey Ratifies the Constitution

18 December 1787 (38 Yea-0 Nay)

Resource 35

Georgia Ratifies the Constitution

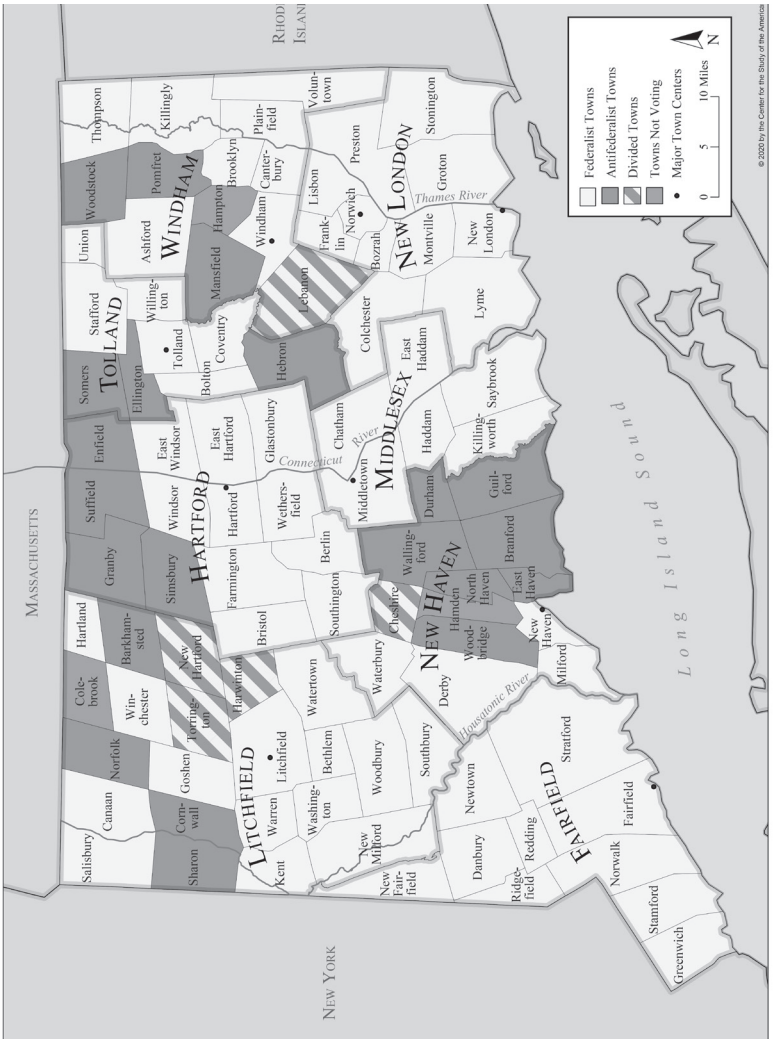
31 December 1787 (26 Yea-0 Nay)



Resource 36

Connecticutt Ratifies the Constitution

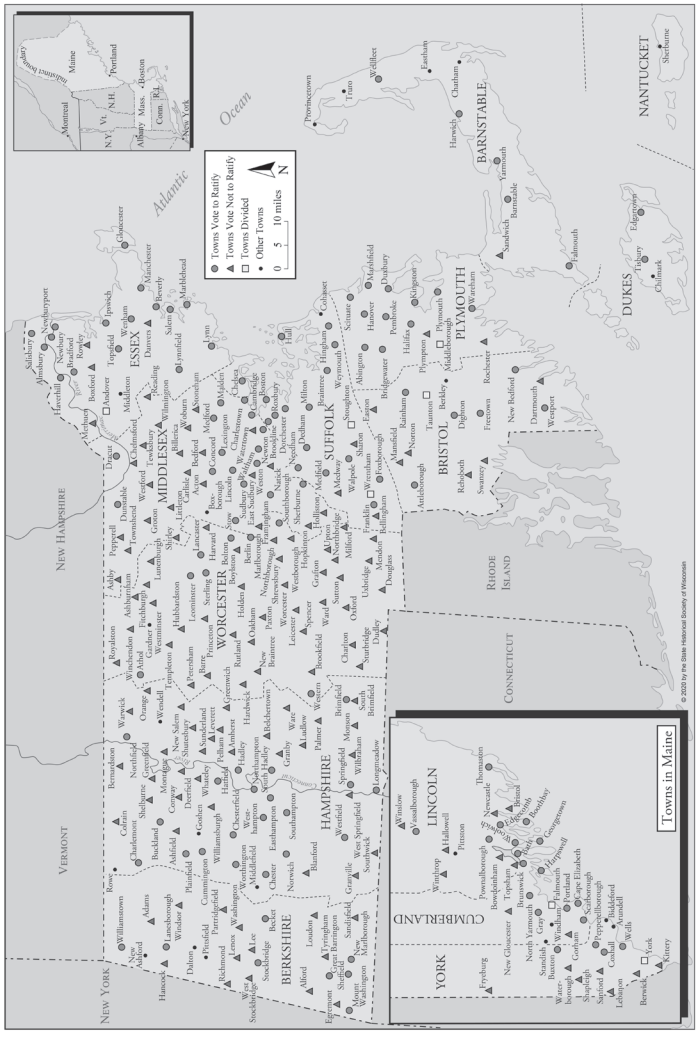
9 January 1788 (128 Yea-40 Nay)



Resource 37

Massachusetts Ratifies the Constitution

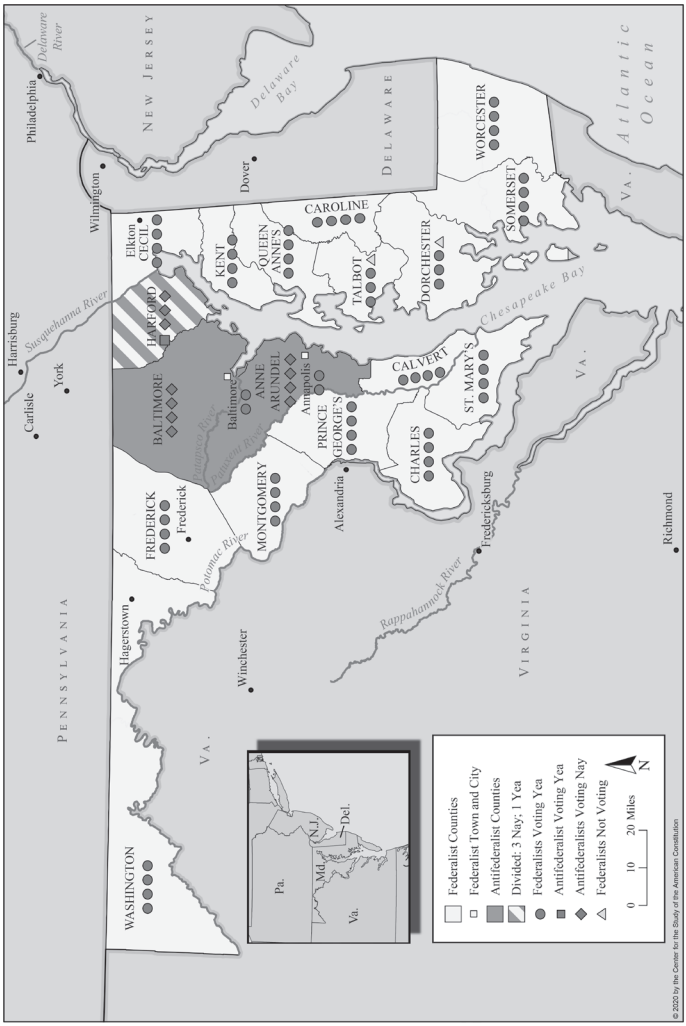
6 February 1788 (187 Yea-168 Nay)


Towns Vote to Ratify
Towns Vote Not to Ratify
Towns Divided
Other Towns
0 5 10 miles
N
Towns in Maine
Atlantic Ocean
VERMONT
NEW HAMPSHIRE
NEW YORK
CONNECTICUT
RHODE ISLAND
BERKSHIRE
HAMPSHIRE
WORCESTER
MIDDLESEX
ESSEX
SUFFOLK
BRISTOL
PLYMOUTH
BARNSTABLE
DUKES
NANTUCKET
YORK
CUMBERLAND
LINCOLN
Montreal
Maine
Portland
N.Y.
Vt.
N.H.
Albany
Mass.
Boston
Conn.
R.I.
New York
Provincetown
Harwich
Chatham
Falmouth
Edgartown
Nantucket
Sherburne
Gay Head
Tisbury
Chilmark
Dartmouth
Westport
Fairhaven
Wareham
Rochester
Freetown
Swansey
Rehoboth
Dighton
Berkley
Middleborough
Plymouth
Kingston
Duxbury
Marshfield
Pembroke
Halifax
Plympton
Hanover
Scituate
Hingham
Cohasset
Weymouth
Abington
Braintree
Milton
Dedham
Bridgewater
Raynham
Taunton
Norton
Mansfield
Easton
Randolph
Stoughton
Sharon
Foxborough
Walpole
Wrentham
Franklin
Bellingham
Medway
Medfield
Needham
Dover
Natick
Sherborn
Framingham
Southborough
Hopkinton
Holliston
Ashland
Sudbury
Wayland
Weston
Lincoln
Concord
Bedford
Lexington
Cambridge
Charlestown
Boston
Roxbury
Brookline
Dorchester
Milton
Chelsea
Malden
Medford
Woburn
Stoneham
Reading
Lynnfield
Wilmington
Billerica
Andover
Tewksbury
Dracut
Chelmsford
Westford
Littleton
Groton
Pepperell
Dunstable
Townsend
Ashby
Shirley
Lunenburg
Leominster
Harvard
Stow
Boxborough
Acton
Carlisle
Bedford
Burlington
Woburn
Winchester
Medford
Malden
Chelsea
Revere
Lynn
Saugus
Salisbury
Amesbury
Newburyport
Merrimack
Haverhill
Boxford
Rowley
Ipswich
Topsfield
Wenham
Hamilton
Essex
Gloucester
Manchester
Beverly
Salem
Marblehead
Danvers
Lynnfield
Middleton
Topsfield
Ipswich
Hull
Weymouth
Braintree
Milton
Dedham
Needham
Wellesley

Resource 38

Maryland Ratifies the Constitution

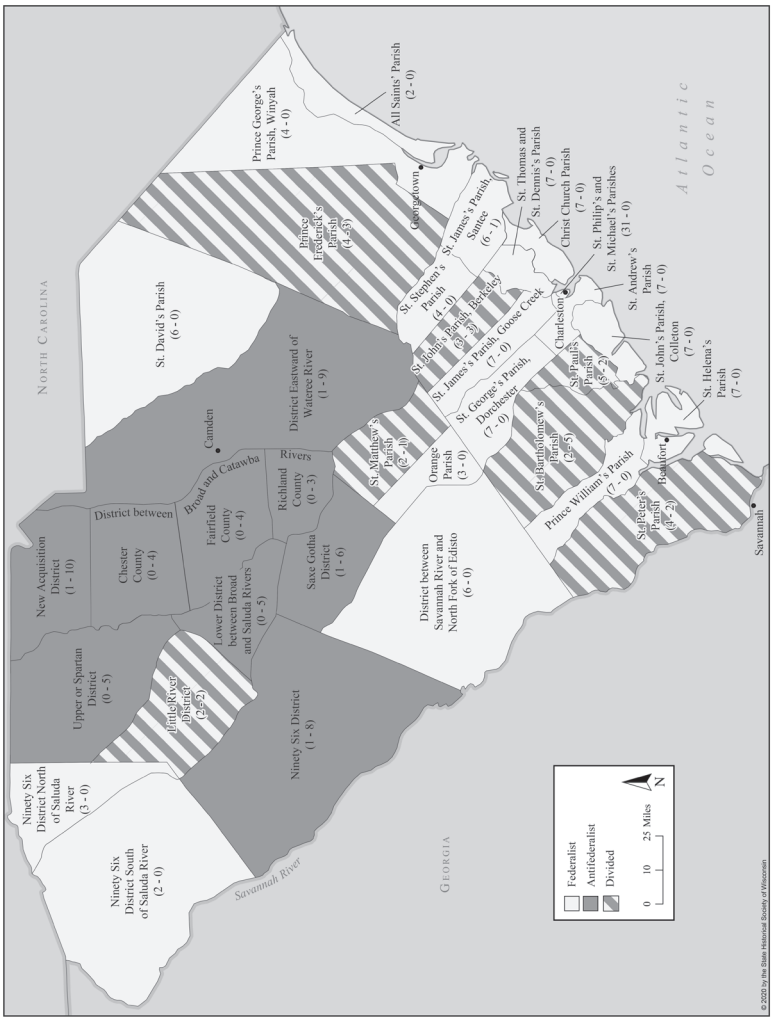
26 April 1788 (63 Yea-11 Nay)



Resource 39

South Carolina Ratifies the Constitution

23 May 1788 (149 Yea-73 Nay)


North Carolina
Georgia
Atlantic Ocean
Savannah River
Ninety Six District North of Saluda River (3 - 0)
Ninety Six District South of Saluda River (2 - 0)
New Acquisition District (1 - 10)
Upper or Spartan District (0 - 5)
Little River District (2 - 5)
Ninety Six District (1 - 8)
District between
Chester County (0 - 4)
Fairfield County (0 - 4)
Lower District between Broad and Saluda Rivers (0 - 5)
Broad and Catawba Rivers
Camden
Richland County (0 - 3)
Saxe Gotha District (1 - 6)
District between Savannah River and North Fork of Edisto (6 - 0)
St. David's Parish (6 - 0)
District Eastward of Wateree River (1 - 9)
St. Matthew's Parish (2 - 0)
Orange Parish (3 - 0)
Prince George's Parish, Winyah (4 - 0)
Prince Frederick's Parish (4 - 5)
All Saints' Parish (2 - 0)
Georgetown
St. Stephen's Parish (4 - 0)
St. John's Parish, Berkley (6 - 2)
St. James's Parish, Goose Creek (7 - 0)
St. George's Parish, Dorchester (7 - 0)
St. James's Parish, Santee (6 - 1)
St. Thomas and St. Dennis's Parish (7 - 0)
Christ Church Parish (7 - 0)
St. Philip's and St. Michael's Parishes (31 - 0)
St. Andrew's Parish (7 - 0)
Charleston
St. Paul's Parish (6 - 2)
St. Bartholomew's Parish (2 - 5)
Prince William's Parish (7 - 0)
St. John's Parish, Colleton (7 - 0)
St. Helena's Parish (7 - 0)
St. Peter's Parish (4 - 2)
Beaufort
Savannah
Federalist
Antifederalist
Divided
0 10 25 Miles
N
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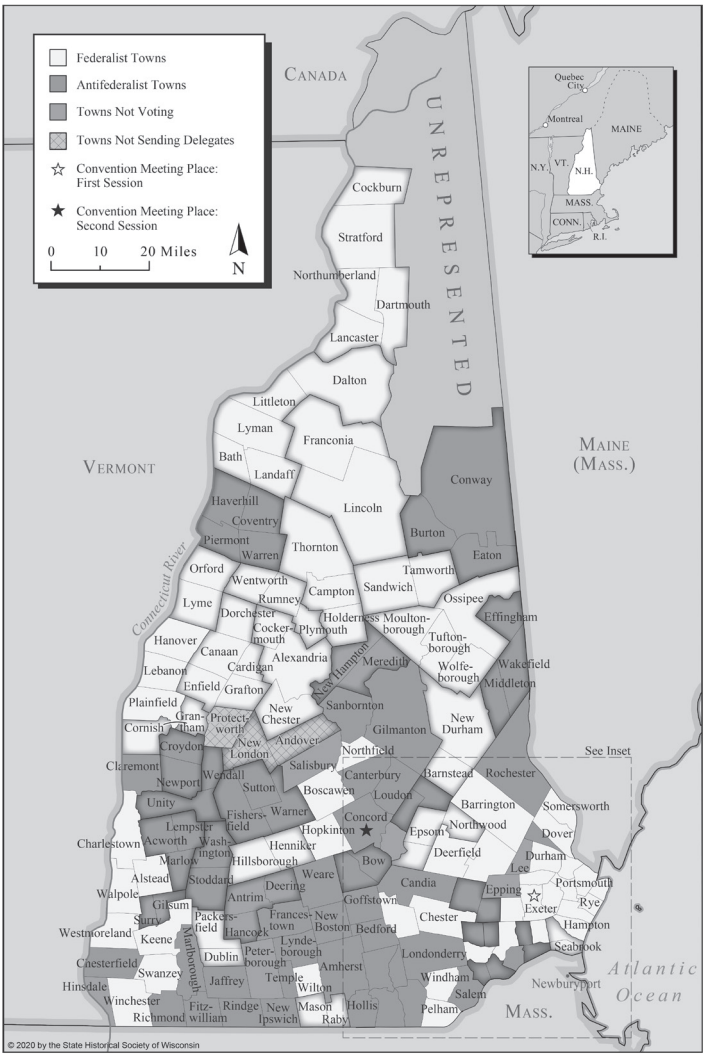
Resource 40

New Hampshire Ratifies the Constitution

21 June 1788 (57 Yea-47 Nay)



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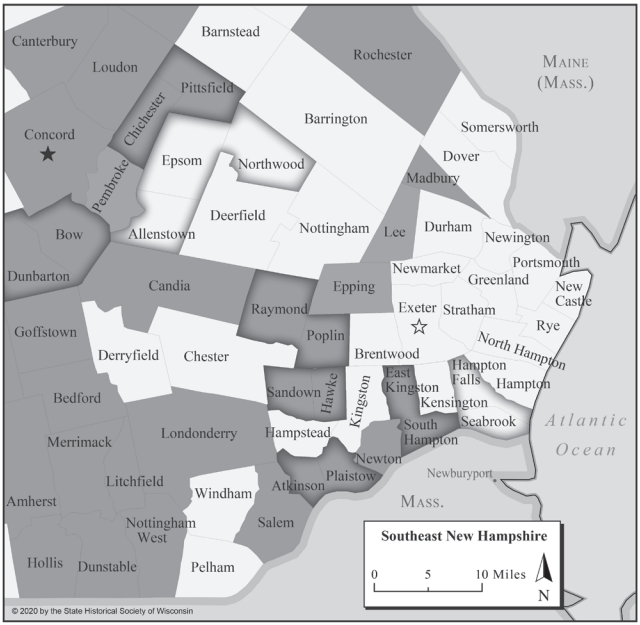


New Hampshire Classed Towns

Towns, parishes, or places with fewer than 150 ratable polls were "classed" together for the purpose of representation. Classed towns are designated by the inner glow feature on both maps.

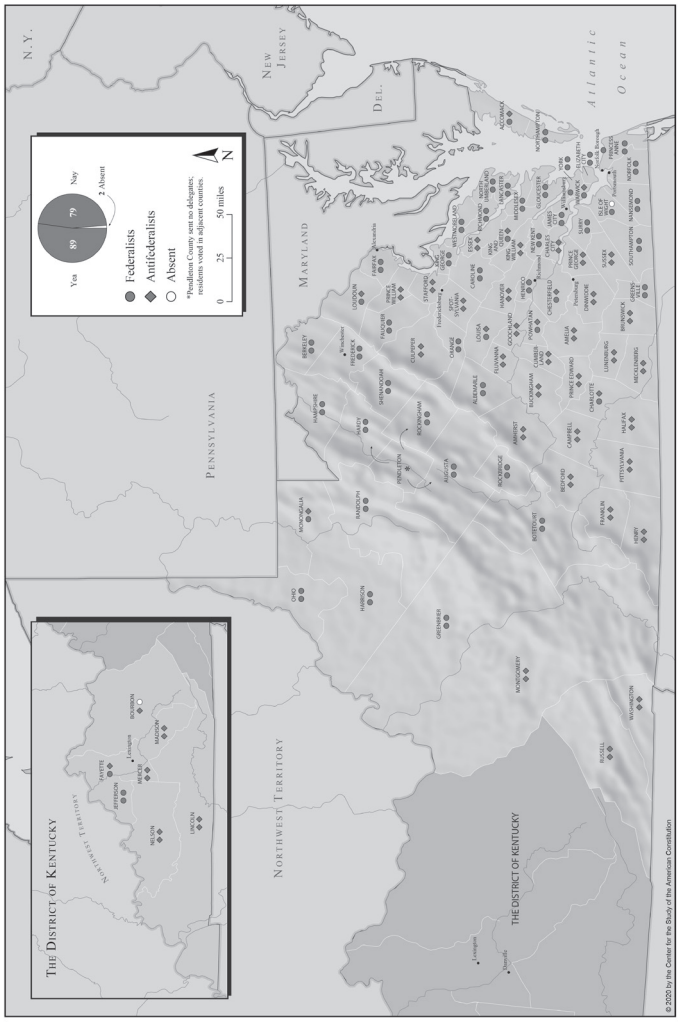
Acworth, Lempster & Marlow
Atkinson & Plaistow
Barnstead, New Durham & N.D. Gore*
Bath, Lyman, Landaff, Littleton & Dalton
Campton, Holderness & Thornton
Chichester & Pittsfield
Conway, Eaton, Burton & Locations
Cornish & Grantham
Dublin & Packersfield
Dunbarton & Bow
Enfield, Canaan, Cardigan, Dorchester & Grafton
Fishersfield, Sutton & Warner
Hampton Falls & Seabrook
Hancock, Antrim & Deering
Haverhill, Piermont, Warren & Coventry
Hawke & Sandown
Henniker & Hillsborough
Lancaster, Northumberland, Stratford, Dartmouth, Piercy,* Cockburn & Coleburn*
Lincoln & Franconia
Lyme & Orford
Meredith & New Hampton
Moultonborough, Tuftonborough, Wolfeborough & Ossipee
New Chester, Alexandria & Cockermouth
New London, Andover & Gore*
Newport & Croydon
Northwood, Epsom & Allenstown
Peterborough & Society Land*
Plymouth, Rumney & Wentworth
Raby & Mason
Raymond & Poplin
Sandwich & Tamworth
South Hampton & East Kingston
Stoddard & Washington
Surry & Gilsum
Temple & Peterborough Slip*
Wakefield, Middleton & Effingham
Wendall & Unity

*Not identified on map

Resource 41

Virginia Ratifies the Constitution

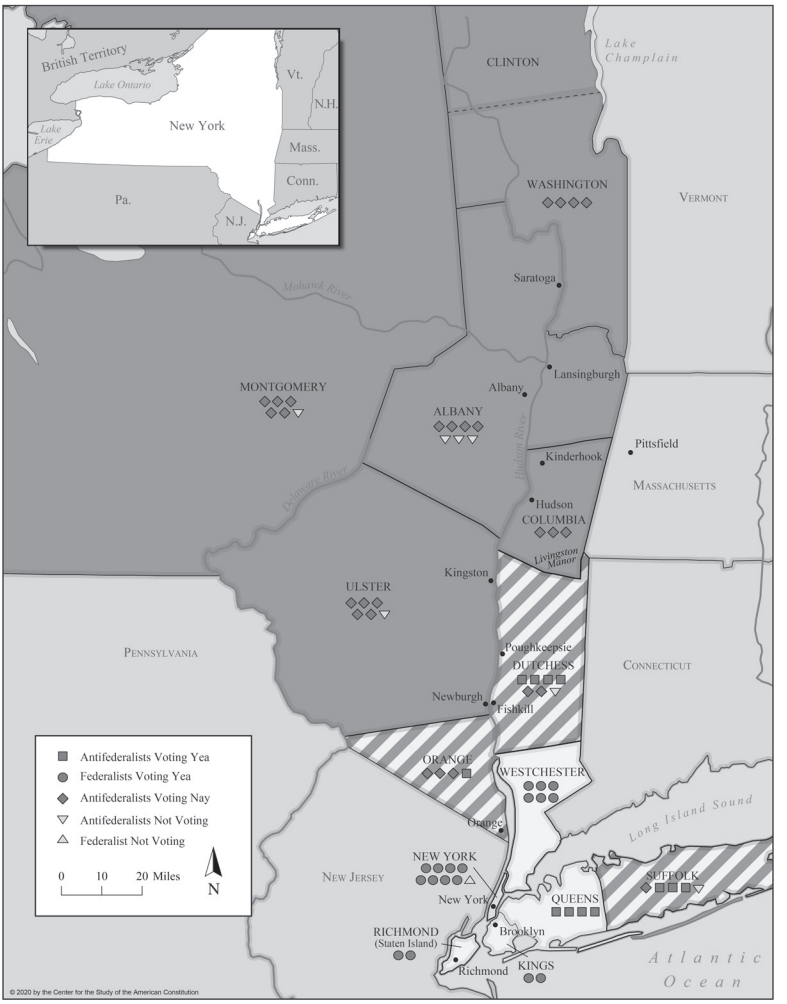
25 June 1788 (89 Yea-79 Nay)



Resource 42

New York Ratifies the Constitution

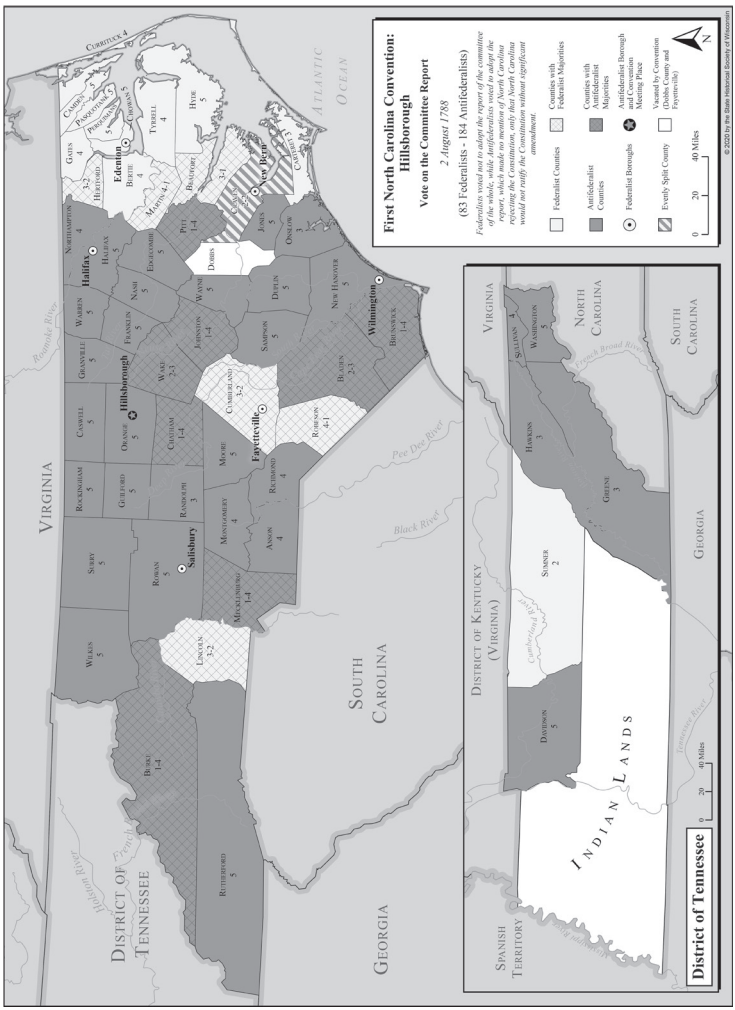
26 July 1788 (38 Yea-7 Nay)



Resource 43

North Carolina Votes on the Constitution

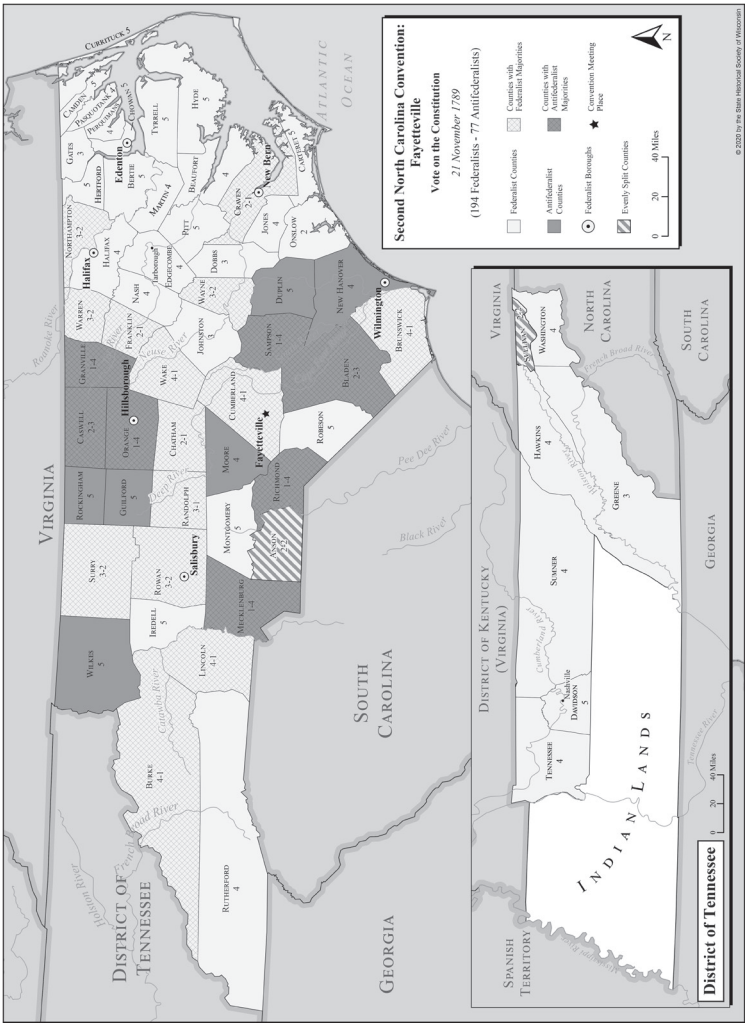
2 August 1788



Resource 44

North Carolina Ratifies the Constitution

21 November 1789 (38 Yea-0 Nay)



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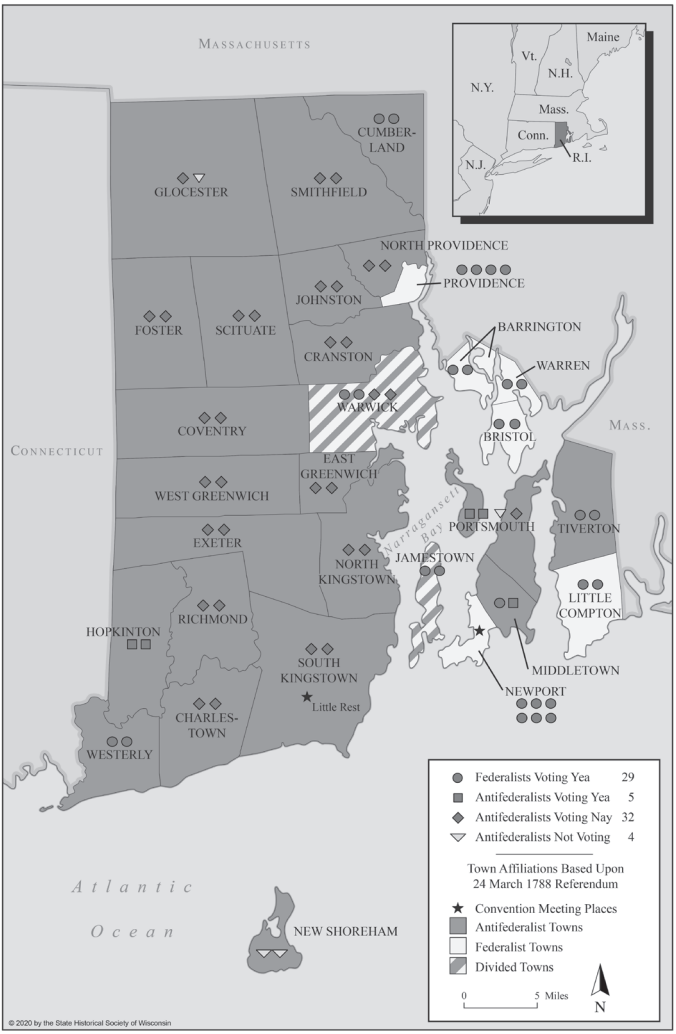
Resource 45

Rhode Island Ratifies the Constitution

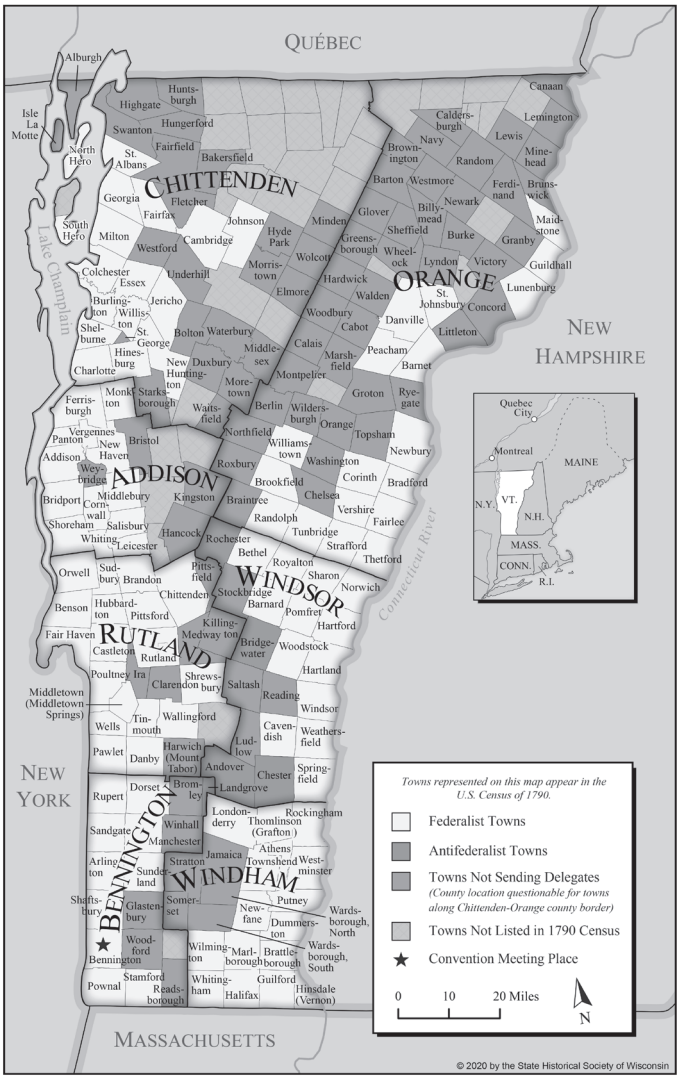
29 May 1790 (34 Yea-32 Nay)



Resource 46

Vermont Ratifies the Constitution

10 January 1791 (105 Yea-4 Nay)



Resource 47

Amendments Proposed by State Ratifying Conventions

Amendments Adopted

Bill of Rights Guarantees	Pa.	Ma.	Md.	S.C.	N.H.	Va.	N.Y.	N.C.	R.I.	Total states
Religious fredom	X		X	X	X	X	X	X	X	8
Free speech	X		X			X		X	X	5
Free press	X		X			X	X	X	X	6
Assembly and petition			X			X	X	X	X	5
Bearing arms	X				X	X	X	X	X	6
Quartering soldiers			X		X	X	X	X	X	6
Searches and seizures	X		X			X	X	X	X	6
Grand jury indictment		X	X		X		X			4
Double jeopardy			X				X			2
Self incrimination	X					X	X	X	X	5
Due process	X		X			X	X	X	X	6
Speedy public trial	X		X			X	X	X	X	6
Cause and nature of accusation	X		X			X	X	X	X	6

Bill of Rights Guarantees	**Pa.**	**Ma.**	**Md.**	**S.C.**	**N.H.**	**Va.**	**N.Y.**	**N.C.**	**R.I.**	**Total states**
Confrontation of accusers & witnesses	X		X			X	X	X	X	6
Counsel	X		X			X	X	X	X	6
Jury trial (civil)	X	X	X		X	X	X	X	X	8
Bail, Fines & Punishment	X					X	X	X	X	5
Rights retained by people	X		X			X	X	X	X	6
Reserved powers	X	X	X	X	X	X	X	X	X	9

Amendments Not Adopted

Proposed Amendment	Pa.	Ma.	Md.	S.C.	N.H.	Va.	N.Y.	N.C.	R.I.	Total states
General										
Separation of Powers	X					X		X	X	4
Treaties cannot violate federal law or U.S. or state constitutions	X		X				X	X		4
No titles of nobility for U.S. officials from foreign state or king		X			X					2
U.S. officials are trustees and accountable to the people			X			X		X	X	4
Doctrine of non-resistance is absurd			X			X		X		3
No suspension of laws			X			X		X	X	4
No federal poll tax	X		X				X		X	4
No federal excise taxes	X		X				X			3
No standing army in peacetime without consent of super majority of congress	X		X		X	X	X	X	X	7
Military subordinate to civil power	X					X	X	X	X	5
Fish and hunt not prohibited on public lands	X									1

Proposed Amendment	Pa.	Ma.	Md.	S.C.	N.H.	Va.	N.Y.	N.C.	R.I.	Total states
Limits on federal taxes	X		X							2
Elections should be free	X					X		X	X	4
Right of Revolution			X			X	X			3
President, Vice President or members of Congress must be natural-born citizens							X			1
Habeas corpus suspension to be limited							X			1
Amendments to Constitution need ratification by eleven original states									X	1
Slave trade to Africa must be stopped as soon as possible									X	1
Public offices not to be hereditary						X		X		2
Conscientious objectors exempted from military service			X			X		X	X	4
Enlistment of soldiers limited			X			X		X		3

Proposed Amendment	Pa.	Ma.	Md.	S.C.	N.H.	Va.	N.Y.	N.C.	R.I.	Total states
Federal bankruptcy laws limited							X			1
Federal commissions to be given in name of the people							X			1
Federal laws cannot violate state constitutions or bills or rights			X							1
Congress										
No monopolies		X			X		X	X	X	5
No member to hold federal office			X			X	X	X		4
Not to interfere in federal elections	X	X	X	X	X	X	X	X	X	9
Restrictions in changing compensation for						X	X	X		3
Rights in Constitution not to extend Congress' powers						X	X	X	X	4
Ex post facto laws apply only to criminal cases							X			1
Congress can introduce foreign troops only by 2/3 vote								X		1
Congress not to interfere with paper money already in circulation								X	X	2

Proposed Amendment	Pa.	Ma.	Md.	S.C.	N.H.	Va.	N.Y.	N.C.	R.I.	Total states
No draft into military									X	1
Borrowing money requires 2/3 vote of each house							X		X	2
Levy no direct taxes without approval of 3/4 state legislatures									X	1
Declaration of war needs 2/ 3 vote in each house							X		X	2
Right to give instructions to representatives						X	X	X	X	4
Journals of to be published at least annually						X	X	X	X	4
Appropriations must be published annually						X		X	X	3
Commercial acts need 2/3 approval			X			X		X		3
Congress control over federal capital limited						X	X	X		3
Yeas and Nays must be called on request of two members			X				X		X	3
Doors of both houses be open to public							X			1

Proposed Amendment	Pa.	Ma.	Md.	S.C.	N.H.	Va.	N.Y.	N.C.	R.I.	Total states
Congress can set uniform rule of inhabitancy or settlement of poor in the states									X	1
Congress cannot grant exceptions from emoluments clause						X	X	X	X	4
Congress may give state courts jurisdiction in revenue cases			X							1
Congress should not appropriate funds for military beyond two years			X							1
Senate										
Senate not to try impeachments alone						X	X	X		3
Treaties ceding land or fishing and navigation rights need 3/4 approval of Senate						X		X		2
Vacancies in Senate to be filled by state legislatures							X			1
Senate terms limited to 6 years within 12 year period							X			1
Senators can be recalled by states							X		X	2

Proposed Amendment	Pa.	Ma.	Md.	S.C.	N.H.	Va.	N.Y.	N.C.	R.I.	Total states
House of Representatives										
Should be enlarged	X	X			X	X	X	X		6
Annual elections required	X									1
District elections not prohibited							X			1
President										
Pardoning power limited							X			1
Privy council	X		X							2
Election of must be held every four years							X			1
President limited to no more than 8 years within 16 years						X		X		2
President limited to two terms							X			1
President not to take command in field			X				X			2
Judiciary										
U.S. Judiciary jurisdiction limited	X	X	X			X	X	X	X	7
No appeal to Supreme Court in criminal cases			X				X			2
Criminal trials must be in vicinage	X		X			X	X	X	X	6

Proposed Amendment	Pa.	Ma.	Md.	S.C.	N.H.	Va.	N.Y.	N.C.	R.I.	Total states
Evidence can be submitted in criminal cases	X		X			X			X	4
Civil law cases under $3,000 not appealable to federal courts			X		X					2
Preemptory challenge of jurors guaranteed						X		X		2
Changes in judges' salaries limited						X		X		2
Justice ought to be readily available						X	X	X	X	4
Federal judges not to hold other offices			X				X		X	3
Federal ownership of property does not prohibit state trials in that area							X			1
Creation of federal inferior courts limited			X				X			2
Court of error to be created							X			1
No federal appellate jurisdiction in cases of fact			X			X	X	X		4
No violations of state's sovereign immunity							X		X	2

Proposed Amendment	Pa.	Ma.	Md.	S.C.	N.H.	Va.	N.Y.	N.C.	R.I.	Total states
States										
Militia limit on out of state activity	X		X				X		X	4
Militia should be under state control	X		X			X	X	X	X	6
Requisitions on must precede direct taxation		X	X	X	X	X	X	X	X	8
Federal officials must take oath not to violate state constitutions							X			1
Congress can only declare state in rebellion by 2/3 vote								X		1
Federal officials must not hold state offices									X	1
Federal duties will be placed in State's quota where raised			X							1
Census to determine proportional taxation		X			X	X	X	X		5

John P. Kaminski et al., eds., *The Documentary History of the Ratification of the Constitution*, Vol. XXXVII: Bill of Rights [1] (Madison, Wis.: Wisconsin Historical Society Press, 2019), 231–32.

For the amendments (a list and text), see pp. 233-77.

Resource 48

From Thomas Jefferson to James Monroe, 12 January 1800

To James Monroe
Jan. 12. 1800

Yours of Jan. 4. was recieved last night. I had then no expectation of any opportunity of communicating to you confidentially information of the state of opinions here. but I learn to-night that two mr Randolphs will set out tomorrow morning for Richmond. if I can get this into their hands I shall send it. otherwise it may wait long. on the subject of an election by a general ticket or by districts, most persons here seem to have made up their minds. all agree that an election by districts would be best if it could be general: but while 10. states chuse either by their legislatures or by a general ticket, it is folly & worse than folly for the other 6. not to do it. in these 10. states the minority is entirely unrepresented; & their majorities not only have the weight of their whole state in their scale but have the benefit of so much of our minorities as can succeed at a district election. this is in fact ensuring to our minorities the appointment of the government. to state it in another form, it is merely a question whether we will divide the US. into 16. or 137. districts. the latter, being more chequered, & representing the people in smaller sections, would be more likely to be an exact representation of their diversified sentiments. but a representation of a part by great & a part by small sections, would give a result very different from what would be the sentiment of the whole people of the US. were they assembled together.—I have had to day a conversation with 113 [Burr] who has taken a flying trip here from N.Y. he says they have really now a majority in their H. of R. but for want of some skilful person to rally round, they are disjointed, & will lose every question. in the Senate there is a majority of 8. or

9. against us. but in the new election which is to come on in April, three or 4. in the Senate will be changed in our favor; & in the H. of R. the country elections will still be better than the last: but still all will depend on the City election which is of 12. members. at present there would be no doubt of our carrying our ticket there; nor does there seem to be time for any events arising to change that disposition. there is therefore the best prospect possible of a great & decided majority on a joint vote of the two houses. they are so confident of this that the Republican party there will not consent to elect either by districts or a general ticket. they chuse to do it by their legislature. I am told the Republicans of N.J. are equally confident, & equally anxious against an election either by districts or a general ticket. the contest in this state will end in a separation of the present legislature without passing any election law (& their former one is expired) and in depending on the new one, which will be elected Oct. 14. in which the Republican majority will be more decided in the Representatives, & instead of a majority of 5. against us in the Senate, will be of 1. for us. they will, from the necessity of the case, chuse the electors themselves. perhaps it will be thought I ought in delicacy to be silent on this subject. but you, who know me, know that my private gratifications would be most indulged by that issue which should leave me most at home. if any thing supercedes this propensity, it is merely the desire to see this government brought back to it's republican principles.—consider this as written to mr Madison as much as yourself; & communicate it, if you think it will do any good, to those possessing our joint confidence, or any others where it may be useful & safe. health & affectionate salutations.

"From Thomas Jefferson to James Monroe, 12 January 1800," *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/01-31-02-0256. [Original source: *The Papers of Thomas Jefferson*, vol. 31, *1 February 1799–31 May 1800*, ed. Barbara B. Oberg. Princeton: Princeton University Press, 2004, pp. 300–301.]

Resource 49

To Alexander Hamilton from James A. Bayard, 8 March 1801

From James A. Bayard
Wilmington [Delaware] 8 March 1801

Dear Sir

I left Washington the 5th. and arrived here last evening. The letter which you did me the honor to write the 22d Ult. reached me on the 4th when I was occupied in arrangements for leaving the Seat of government. I remained in Washington on the 4th. thro' necessity tho not without some curiosity to see the inauguration & to hear the speech. The scene was the same as exhibited upon former occasions and the speech in political substance better than *we* expected; and not answerable to the expectations of the Partizans of the other side.

After the inaugural ceremony, most of the federal gentlemen paid their respects to the President & the Vice, and were received with very decent respect. Mr. Adams did not attend, he had been Sufficiently humbled to be allowed to be absent. Your views in relation to the election, differed very little from my own, but I was obliged to yeild to a torrent which I perceived might be diverted, but could not be opposed.

In one case I was willing to take Burr, but I never considered it as a case likely to happen. If by his conduct he had completely forfeited the confidence and friendship of his Party and left himself no resort but the support of the federalists, there are many considerations which would have induced me to prefer him to Jefferson. But I was enabled soon to discover that he was determined not to shackle himself with federal principles and it became evident that if he got in without being absolutely committed in relation to his

own Party, that he would be disposed & obliged to play the game of McKean upon an improved plan and enlarged scale.

In the origin of the business I had contrived to lay hold of all the doubtful votes in the House which enabled me according to views which presented themselves to protract or terminate the controversy.

This arrangement was easily made, from the opinion readily adopted from the consideration, that representing a small state without resources which could supply the means of self protection I should not dare to proceed to any length which would jeopardize the constitution or the safety of any state. When the experiment was fully made, I acknowleged upon all hands to have completely ascertained, that Burr was resolved not to commit himself, and that nothing remained but to appoint a President by law, or have the government without one. I came out with the most explicit & determined declaration of voting for Jefferson. You cannot well imagine the clamour & vehement invective to which I was subjected for some days. We had several caucuses.All acknowleged that nothing but desperate measures remained, which several were disposed to adopt, & but few were willing openly to disapprove. We broke up each time in confusion and discord, and the manner of the last ballot was arranged but a few minutes before the ballot was given. Our former harmony however has since been restored.

The public declarations of my intention to vote for Jefferson to which I have alluded were made without a general consultation, knowing that it would be an easier task to close the breach which I foresaw, when it was the result of an act done without concurrence than if it had proceeded from one against a decision of the Party. Had it not been for a single gentleman from Connecticut, the eastern states would finally have voted in blank in the same manner as done by S. Carolina & Delaware. But because he refused, the rest of the Delegation refused and because connecticut insisted upon continuing the ballot for Burr New Hampshire Massachusetts & Rhode Island refused to depart from their former vote.

The means existed of electing Burr, but they required his co-operation. By deceiving one Man (a great blockhead) and tempting two (not incorruptible) he might have secured a majority of the States. He will never have another chance of being President of the U.states and the little use he has made of the one which has occurred gives me but a humble opinion of the talents of an unprincipled man.

"To Alexander Hamilton from James A. Bayard, 8 March 1801," *Founders Online*, National Archives, https://founders.archives.gov/documents/Hamilton/01-25-02-0190. [Original source: *The Papers of Alexander Hamilton*, vol. 25, *July 1800–April 1802*, ed. Harold C. Syrett. New York: Columbia University Press, 1977, pp. 344–346.]

Resource 50

Amendment XII of the U.S. Constitution

Manner of Choosing a President and Vice-President
This Amendment altered Article 2 Section 1 Part 2
Passed by Congress December 9, 1803. Ratified July 27, 1804.

1. The Electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; - The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. A*nd if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them*, *before the fourth day of March next following*, *then the Vice-President shall act as President*, *as in case of the death or other constitutional disability of the President.* (The words in italics were superseded by Amendment XX)

3. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such numbers be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

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